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Tagore Law Lectures—1889—90.

THE

LAW OF AGENCY

IN

BRITISH INDIA.

BY

T. A. PEARSON,

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THE LAW OF AGENCY.

LECTURE I.

How far the Contract Act contains law of agency—Definition of agent and principal—The contract of agency—Its effect—Consideration for contract—Who may be agents—Different classes of agents—Appointment of agents—how made—Seal—by formal power—by informal letter—what appointments must be in writing—oral appointment—appointment of Partners.

How far the Contract can be taken as a guide to the law of Agency in British India.—The subject chosen by the Senate of the University of Calcutta for the Tagore Lectures of 1889, is the "Law of Agency in British India." The Indian Statute book throws little or no light on this subject, save so far as the few sections touching on a portion of the subject are dealt with in the Contract Act of 1872. That Act; however, is, and purports to be, only a partial measure. It's preamble recites that "it is expedient to define and amend certain parts of the law relating to contracts." It's first section repeals certain enactments specified in the Schedule, but provides that nothing contained in the Act "shall effect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."[1]

The Act therefore lays down certain general rules, which in the absence of any special contract or usage to the contrary, are binding on contracting parties, but which do not restrain free liberty of contract as between man and man, or invalidate usages or customs which may prevail in any particular trade or business. These customs and usages have only the effect of introducing special terms into all contracts or dealings in any particular trade; their very object being generally to modify or control the general law; the Contract Act, therefore, is not intended to invalidate all customs or usages which are not in accordance with the general rules which it enacts, or to prevent private persons from entering into contracts which are inconsistent with these rules. It appears that the meaning to be placed upon the words "inconsistent with the provisions of this Act," have been considered by Garth C. J. to mean no more than that no *general* usage or custom of trade, that is, *no usage or custom pervading all trades,*

[1] As to the effect of these words see. *Kuverji Tulsidas* v. *G. I. P. Ray. Co.*, I. L. R. 3, Bom. (113) and *Moothora Kant Shaw* v. *India General St. Nav. Co.*, I. L. R. 10 Calc., (185).

inconsistent with the provisions of the Act, shall be valid. Any general usage of that kind being equivalent to a *general* law; no general law or usage in contravention of the general law laid down by the Contract Act being consistent with the validity of the Act itself.[1]

It is quite clear, therefore, that the Contract Act alone cannot be looked at as supplying the whole law of Agency in British India, even so far as contracts relating to that law are concerned;[2] and it is further clear that it can in no way touch upon the law of Torts as applicable to the law of Principal and Agent. In the case of *Mollwo March and Co.* v. *The Court of Wards*[3] their Lordships of the Privy Council have held that in the absence of any law or well established custom existing in India on the subject of the law of partnership, English law may properly be resorted to, in mercantile affairs, for principles and rules to guide the Courts in this country to a right decision; but that, although this is so, it should be observed that in applying these principles and rules, the usages of trade, and habit of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind. This remark appears to be equally applicable to other branches of the law than that of partnership, and indeed the law of partnership does of itself form part of the law of Principal and Agent I take it therefore that where no assistance can be had from the Contract Act or other enactment of the Indian Statute book, and where no custom or usage is to be found, the Common law of England, and the law as formerly administered in the Courts of Chancery in England may be made use of to guide us in India to the law relating to Agency. Further, the Indian case law on the subject of Agency is very meagre, and is, with few exceptions, of little or no assistance in laying down principles and rules to guide us in this extensive subject. I have, therefore, as will be seen in the course of these lectures, made free use of the English case law on the subject, wherever Indian Case law is not forthcoming, as illustrative of the general principles of the law of Agency.

The Contract of Agency

The Agent.—An agent is a person employed to do any lawful act for another, or to represent another in lawful dealings with third persons; or one whose unauthorized lawful act has been duly ratified.[4]

The Principal.—The person for whom such act is done, or who is so represented, is called the principal.[5] The principal may be disclosed, or he may

[1] *Moothoora Kant Shaw* v. *India General St Navig, Co*, I. L. R 10 Cal., 185

[2] See also that portion of the objects and reasons for the Act set out by Prinsep J in *Moothoora Kant Shaw* v. *India General St. Nav Co*, I L R 10 Cal., (193)

[3] 10 B L. R. 312; L. R. I. A. (Supp. Vol.) 86.

[4] Ind. Contr. Act, ss 182, 196

[5] Ind. Contr. Act. s. 182

be undisclosed; the latter may be defined, as either a principal who is known to exist, but whose name is unknown to the person with whom the agent has contracted, or a principal whose existence is unknown.[1] In such cases, the agent must necessarily contract in his own name, and either the agent or the principal may sue or be sued on the contract.

The Contract of Agency.—The relation created between the principal and the agent, is termed an agency; this relation requires the consensus of both parties, and there must be, either an express or implied assent to, or a subsequent ratification of that relation.[2] The power delegated by the latter to the former is called, the authority.

Its effect.—Every contract made with an agent in relation to the business of the agency, is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal, and the principal, and not the agent, is bound to the party. And, as will be seen hereafter, it is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority the principal is responsible, and not the agent. The agent becomes personally responsible only when the principal is not known, or where there is no responsible principal, or when he becomes liable by an undertaking in his own name or when he exceeds his power. Therefore, if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal in the case the agent had authority to bind him.[3]

Consideration for the contract.—The contract of agency, like every other contract not falling within the exceptions set out in the twenty-fifth section of the Indian Contract Act, requires consideration, but no express consideration is, however, necessary, the acceptance of the office of agent being sufficient consideration for the appointment;[4] and this, though it is not clearly expressed, is probably what is meant by section 185 of the Contract Act.

Who may be agents.—Disqualifications for contracting on a person's own account are not necessarily disqualifications for contracting as the agent of

[1] See for a further test of what constitutes an undisclosed principal, United Kingdom Mutual Steamship Assurance Co. *v.* Nevill, L. R. 18 Q. B. D., (116).

[2] *Markwick* v *Hardingham*, L. R 15 Ch. D., 349.

[3] Kent's Comms, Pt. V, p 835

[4] Stokes Anglo-Indian Code, Vol. I, p. 519. *Vishnucharya* v. *Ramchandra*, I. L R. 5 Bom. 253, see also *Bhoobun Chunder Sen* v. *Ram Soonder Surma Mozumdar*, I. L. R. 3 Cal., 304.

another; for an agent is considered as a mere instrument; the rule, therefore, is, that as between the principal and third persons, any person may become an agent;[1] and the reason is, as is said in an ancient authority, "few persons (if any) are excluded from exercising a naked authority to which they are delegated, and therefore monks, infants, *femes covertes*, persons attainted, outlawed, excommunicated, villeins, aliens, &c., may be attorneys, for the execution of a naked authority can be attended with no manner of prejudice to the persons under such incapabilities or disabilities, or to any other persons after their deaths."[2] But no person, who is not of age and of sound mind, can become an agent so as to become responsible to his principal for acts done by him,[3] and for this reason, that such persons are taken to have no legal discretion or understanding to bestow on the affairs of others any more than upon their own. A person appointing, therefore, a minor, or a person of unsound mind, as his agent, would be bound by his acts if carried out within the scope of the authority given; and could take advantage of contracts entered into by him with third parties, but would be unable to obtain damages from such agent for any loss or injury sustained by his negligence, want of skill, or diligence Appointments of such persons as agents are not likely to occur in practice, and it is therefore unnecessary to enter into the subject further. No one, however, can become agent of another, except by that other's consent.[4]

Incompetency to act as agents.—But although a person may be otherwise fully qualified to act as an agent, he is forbidden to act as agent in cases in which his interest is opposed to that of his principal. No man can, as says Lord Cairns,[5] acting as agent, be allowed to put himself into a position in which his interest, and his duty will be in conflict. And this arises from the fact that an agent is supposed to make use of all his zeal, integrity, and vigilance for the exclusive benefit of his principal; thus, an agent cannot, in a sale made by him on behalf of his principal, himself become the purchaser at such sale; nor can he, when acting as a purchaser on behalf of his principal, sell his own goods to his principal.[6] And this rule applies both to agents for reward, and to gratuitous agents.[7]

[1] Ind. Contr. Act, s. 184.

[2] *Co. Lit.* 52, *a*; 1 *Bac, Abr. tit.*, "*Authority*" B. *Comyn's Dig. tit.*, *Attorney* C. (41). *Emerson* v. *Blogden*, 1 Esp. 142. *Wynne* v. *Wynne*, 4 M. & G. 253. *Andrews* v *Andrews*, L. R. 15 Ch. D. 246, per James, J.

[3] *Ind. Contr. Act*, s. 184.

[4] *Pole* v. *Leask*, 9. Jur N. S. 829.

[5] *Parker* v. *McKenna*, L. R. 10 Ch. D., (118)

[6] *Lowther* v. *Lowther*, 13 Ves., 103. *Massey* v. *Davies*, 2 Ves., 317. *Bentley* v. *Craven*, 18 Beav. 75., *In re Cape Breton Co.*, L R. 26 Ch. D., 221.

[7] *Proof* v. *Hines*. Forrest, 111 *s. c.*; *Cases in Equity*. Talbot, c. 115. *Paley on Pr. and Ag.*, 12.

As has been seen, the requisites for an agent who is to be responsible to his principal, are, majority, and soundness of mind.

Majority.—Now the age at which persons in this country reach majority, may be placed, for convenience sake, under two headings :—

I. Prior to the Indian Majority Act of 1875.

II. Under the Indian Majority Act of 1875.

I. Previously to the 2nd June 1875, the date on which the Indian Majority Act came into force, and subject to certain special Regulations and Acts[1] passed by the different legislative powers in India, (which Acts and Regulations, however, only affect persons claiming to have attained majority prior to the 2nd June 1875) the age at which majority was attained by Hindus of the Bengal School was at the close of the fifteenth year,[2] by Hindus of the Mithila and Benares School[3], and by Jains[4] at the close of the sixteenth year; by Mahomedans[5], generally at the close of their fifteenth year, if puberty had not been attained previously; by European British subjects, and others not being Hindus or Mahomedans, and not subject to any of the special Acts and Regulations referred to, whether domiciled in British India, or not[6], at the close of their 21st year.

II. Under the Indian Majority Act 1875, which applies to all persons domiciled in British India, every minor of whose property and person a guardian has been appointed by a Court of Justice,[7] and every minor under the guardianship of the Court of Wards, notwithstanding anything contained in the Indian Succession Act or in any other enactment, attains majority on completion of their 21st year, every other person domiciled in British India attaining thereby majority on the completion of their eighteenth year.

That Act, however, does not affect

(1) the capacity of any person to act in the following matters, *viz.*, marriage, dower, divorce and adoption

(2) the religion or religious rites and usages of any class of Her Majesty's subjects in India; or

(3) the capacity of any person who before the Act came into force had attained majority under the law applicable to him,

[1] Reg. II of 1803, s. 32, Mad. Reg. V of 1804, s. 4, Act XL of 1858, s. 26, Act XX of 1864 s. 30, Beng. Act, IV of 1870, s. 1, Act XIII of 1874, s 2.

[2] 2 Mac. H L. (1828), p. 220; *Cally Churn Mullick* v *Bhuggobutty Churn Mullick*, 10 B. L R. 231, Str. H. L. 27. *Shiddeshwar* v. *Ramchandrarav*, I L. R. 6 Bom. 463.

[3] 2 Str. H. L (1830), pp 76, 80.

[4] *Govindath Roy* v. *Gulab Chand*, 5 Sel. Rep., 280.

[5] Mac. Mah. L. Chap. VIII, 1, p. 62. Dural Mookhtar see Sup. Gaz. India Apl. 25, 1874, p. 670. Tagore Law Lect. 1877, p. 6.

[6] *Hearsey* v. *Gudharee Lall*, N. W P., H. C. (1871), 338.

[7] *Sattya Ghosal* v. *Suttyanund Ghosal*, I L. R. 1. Calc., 388.

Question arising, therefore, under the 3rd exception will have to be decided by the personal law of the individual concerned, or under the special Acts and Regulations mentioned above.

Nor does that Act affect persons temporarily residing but not domiciled in British India,[1] and the status of such persons is left to be governed by the personal law of their domicile, such law, in the case of European British subjects, being the common law of England, which recognizes the close of the twenty-first year as the age of majority.

Sound mind.—A persons is of sound mind for the purpose of contracting *if at the time when he makes a contract*, he is capable of understanding it, and of forming a rational judgment as to its effects upon his interests. Persons who are usually of unsound mind, but occasionally of sound mind, are not prohibited from contracting in intervals of sound mind; but persons who are usually of unsound mind cannot contract whilst they are of unsound mind.[2]

The meaning of the term under Act XXXIV of 1858.—The term "unsound mind" as used in section 1, Act XXXIV of 1858 (an Act to regulate proceedings in lunacy in Courts of Justice established by Royal Charter) has been held[3] to comprehend, imbecility whether conjenital or arising from old age, as well as lunacy or mental alienation resulting from disease. Latham, J. in his judgment in the case referred to says "it appears that from the opinion of Taylor expressed in his work of Medical Jurisprudence, 2nd ed., 1873, Vol. II, 480 "unsound mind" is not a medical, but a legal expression, denoting an incapacity to manage affairs; that the term would seem to answer to the old legal term *non compos mentis;* This term according to Co. Lit. 246 is equivalent to "of no sound memorie," and is of four sorts," I. Ideota which from his nativity by a perpetual infirmitie, is *non compos mentis.* II. He that by sickness, grief or other accident, wholly loseth his memorie and understanding. III. A Lunatique that hath sometime his understanding and sometime not, *aliquando gaudet lucidis intervallis*, and therefore he is called *non compos mentis* so long as he hath not understanding; IV. He that by his own vitious act for a time depriveth himself of his memorie and understanding, as he that is drunken"; "but that last kind of *non compos mentis*," adds Lord Coke, "shall give no privilege or benefit to him or his heirs." This passage is useful as showing the different meanings attributable to "unsoundness of mind."

The meaning of the term "unsound mind" as used in the Indian Contract Act excludes the proposition laid down in *Molton* v. *Caroux*,[4] that even though a contract be entered into by a person of unsound mind, if it has been performed,

[1] Rohilkand and Kumaun Bank v. Row, I. L. R. 7 All, 490.

[2] Ind. Contr. Act, s. 12.

[3] *Cowasji Beramji Lilaovala, in re* I. L. R 7 Bom. 15.

[4] 2 Ex., 502.

and if the party dealing with the person of unsound mind had no knowledge of such state of mind, and made the contract *bonâ fide* believing him to be sane, such contract cannot be questioned.[1] When once unsoundness of mind has been established, the *onus* of proving a lucid interval is thrown on him who alleges it, and to prove it, he must establish, beyond a mere cessation of violent symptoms, a restoration of mind sufficient to enable the party soundly to judge of the act.

Drunkenness.—Intoxication clearly is intended to have an effect upon contract, as appears from illustration (*b*) to s. 12 of the Contract Act. The stage of intoxication there referred to as affecting a contract is, that the person must be so drunk as to be unable to understand the term of the contract, or form a rational judgment as to its effect or it's interest. This appears to be also the law in England on the subject, as laid down by Chief Baron Pollock in *Gore* v. *Gibson*,[2] who says:—"The authorities on the subject are collected in Kent's Comm., p. 451, where the learned author observes that although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication, on the ground that he should not be allowed to stultify himself, the result of the modern authorities is, that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice"; the Chief Baron then pointed out that with regard to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. It appears that in the case last cited the Court were of opinion that a contract made by a man in such a state of drunkenness was void; but in *Mathews* v. *Baxter*[3] it was held that the contract of a man too drunk to know what he was about, is voidable, and not void, and therefore capable of ratification when he becomes sober; but in this country a man so drunk as not to be able to understand the terms of the contract, or form a rational judgment as to its effect on his interests cannot contract at all while such drunkenness lasts. And in all cases in which persons of unsound mind (in which term drunkenness is included) contract, the test to be applied in this country, for the purpose of determining their liability, will be, what was the mental condition of the contracting party *at the time* when the contract was entered into?

Possession of the power of attorney.—The power of attorney is the instrument of the attorney to whom it is given, and he is to keep it, and under it to show that he has authority for what he has done.[4] And a person paying money to the donee of the power and thereby exhausting the power has no right

[1] *Hall* v *Warren*, 9 Ves., 611.
[2] 13 M. & W., 623.
[3] L. R. 8 Ex., 132.
[4] *Hibberd* v. *Knight*, 2 Exch., 12.

to claim possession of it.[1] But after revocation it is presumed that the principal may demand it back, for otherwise the attorney by showing the instrument to a third party might bind his principal.[2]

Varieties of classes of Agents.—There are many classes of agents employed in carrying out the transactions of the mercantile world, and they are almost without exception agents who are remunerated for their services. It is with such that these lectures chiefly deal. The following are the most conspicuous and widely recognized, *viz.*, attornies, auctioneers, banians, bankers, brokers, factors, masters of ships, ships' husbands, partners, pleaders or vakils and mookhtears, each of whom as will be seen hereafter possess incidental authorities with reference to their peculiar occupations.

Auctioneers—An auctioneer is an agent for the public sale of property; he is the agent for each party, buyer and seller, in different things, but not in the same thing; when he prescribes the rules of bidding, and the terms of sale, he is acting as the agent of the seller; but when he puts down the name of the buyer, he is the agent for him only,[3] or to put it otherwise, he is according to established usage until the fall of the hammer, the agent of the seller alone. And on the fall of the hammer, he becomes the agent for both parties to strike the bargain, and is further authorized as the agent of both parties to do what is necessary to bind the bargain by a written contract.[4] The difference between an auctioneer and a broker is, that the former only sells, whilst the latter both buys and sells;[5] at a private sale he is, however, agent for the vendor only; he is usually paid by commission a percentage on the purchase-money, and where there is no arrangement for payment, he is entitled to reasonable remuneration; and if his employer is aware of his customary charge, he will in general be bound by it.[6]

Attornies.—An attorney, is an agent employed to conduct the prosecution or defence of a suit, or other legal proceeding on behalf of another, or to advise that other on legal questions, or to frame documents intended to have a legal operation, or generally to assist him in matters affecting his legal position; he is considered to be an officer of the Court in which he practises, and the Courts will exercise summarily jurisdiction over him. Under the several Letters Patent of the different Presidency High Courts he is admitted and enrolled, and is authorized to appear and act for suitors under rules framed by such Courts; he

[1] *Pridmore* v *Harrison*, 1 C. & K, 613.

[2] Story on Agency, 470.

[3] *Williams* v *Millington*, 1 H. Bl, 85 per Heath, J.

[4] Benjamin on Sale, 246. *Simon* v. *Motivos*, 3 Burr, 1922. *Hinde* v. *Whitehouse*, 7 East, 371 *Emmerson* v *Heelis*, 2 Taunt, 38, (48).

[5] *Wills* v. *Ellis*, arguendo, 2 H Bl, 557.

[6] Sugd, 45 *Rainy* v. *Vernon*, 9 C. & P 559 *Mews* v *Carr*, 1 H & N 488

is entitled to practise in the Courts subordinate to such High Courts in which he is enrolled and in all Revenue offices situate within the local limits of the appellate jurisdiction of such High Courts, and he may, when so entered and ordinarily practising in the Court on the rolls of which he is so entered, or some Court subordinate thereto, practice in any Court in British India other than a High Court established by Royal Charter on the roll of which he is not entered and in any Revenue office.[1] He is at liberty also to practise in the Court of the Recorder of Rangoon and in the Courts of the Judicial Commissioner of British Burmah and in any Courts subordinate to these functionaries.[2] Under the rules which the several High Courts are empowered to draw up regulating his powers, duties and functions,[3] an attorney of a High Court other than the Calcutta Court since the 1st January 1880, is not entitled to practise as such in the Lower Provinces, of Bengal unless he ordinarily practises in the Court on the roll of which he is entered, or some Court subordinate thereto.[4] He may plead in a Criminal Court, other than the original sides of the several High Courts ;[5] but can conduct a prosecution in a magistrate's Court only with permission of such Court ;[6] and in Calcutta he may appear and plead in the Court of Small Causes.[7] And all Courts must take judicially notice of him.[8] He may, if an attorney of a High Court, also be admitted to practice in the Privy Council.[9]

The Banian.—A Banian is a class of agent peculiar to India, he is a *del-credere* agent with regard to his employers, and a principal with reference to third persons. But a person who has been allowed to present himself as agent of a merchant under a general authority is not, as such, a banian.[10] He has been described by Norman, C. J. as follows: "He often, if not generally, advances money to the firm in which he is employed, he gives security; if he sells the goods of the firm he is a sort of *del-credere* agent, guaranteeing the payment of the price by the bazaar dealers or other purchasers to his principal, and as to purchases he is the direct purchaser in the bazaar."[11] In *Juggobundhoo Shaw* v. *Grant Smith*,[12] the ruling of a Full Bench of the Supreme Court in *Boidjonauth*

[1] Act XVIII of 1879, s 5.

[2] Act XV of 1875, ss 84, 87.

[3] Act XVIII of 1879, s. 5.

[4] Circular Order No. 38 of 15th Dec., 1879. See Genl. Rules and Orders, App. Side Calc., p 280.

[5] Act X of 1882, ss. 4, 145.

[6] Act X of 1882, s. 495.

[7] Act XV of 1882, s. 76.

[8] Act I of 1872, s. 57, (12).

[9] In re Twidale's Petition, L R. 14 App. Cas, 328, I. L. R 16 Calc., 636.

[10] *Juggobundhoo Shaw* v. *Grant Smith and Co.*, 2 Hyde, 129.

[11] *Grant* v. *Juggobundhoo Shaw*, 2 Hyde per Norman, C. J., 302, (309).

[12] 2 Hyde, 129, (147).

v. *Paterson*[1] to the effect, that when produce is purchased by a banian, on the general account of a European firm, credit is understood to be given him, unless there is an express contract by or on behalf of the European firm to be responsible for the price, is referred to with approval; and in the Court of Appeal[2] the case is again mentioned as showing that there is a recognized custom that in the absence of express stipulation the vendor gives credit to the banian. The case of *Faizulla* v. *Ramkamal Mitter*[3] decided in 1868, also lays down that there is a peculiar presumption in Calcutta that the seller can look to the banian for his price, and to the banian alone; and that where it is shown that a person is dealing with a banian it lies on that person to show that the employers of that person have consented to take on themselves a liability which in ordinary cases would not arise. Colville, J. has however said in the case of *Gobind Chunder Sein* v. *Ryan*,[4] which was, however, decided in 1861 that although there is a general similarity there is by no means uniformity in the relation of banians with their employers in Calcutta, and that a Court would not be justified in assuming a usage of trade with regard to their functions and powers.

Bill Brokers.—A bill broker is not an agent known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing, his duties may vary in different places, and their extent is a question of fact to be determined by the usage and course of dealing in the particular place.[5] He has, however, been held not to be at liberty when receiving a bill for the purpose of discounting, to mix it with the bills of other customers, and to pledge the whole mass as security for an advance made to himself,[6] but the rule there laid down was in *Foster* v. *Pearson*[5] said to be subject to the right of the parties to contract as they thought proper.

Brokers.—The term broker is applied to persons who act as the medium of negotiating and contracting any kind of bargains; he has been defined, by Lord Chief Justice Comyns, as an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called brokerage.[7] The term is, however, most usually applied to persons who negotiate and effect contracts of sale with merchants.

Brokers for sale or purchase.—A broker for sale or purchase is an agent to sell or purchase goods for another; according to the usual course of business.

[1] 2 Buln., 203.
[2] 2 Hyde, 301, (315).
[3] 2 B. L. R. (O. C.), 7.
[4] 15 Moo. P. C., 230, (235).
[5] *Foster* v. *Pearson*, 1 C. M. & R., 849.
[6] *Haynes* v. *Foster*, 2 C. & M., 237.
[7] *Comyn's Dig.*, "*Merchant*," C. See also per Brett, J. in *Fowler* v *Hollins*, L. R. 7 Q. B., 616.

he is not entrusted with the possession or control of the goods to be sold or purchased; he contracts only in the name of his principal;[1] and has been defined as a person making it a trade to find purchasers for those who wish to sell, and vendors for those who wish to buy, and to negociate and superintend the making of bargains between them.[2] The usual mode in which he binds the buyer is by making an entry of the contract in his book and signing the same with his hand, and by sending to the buyer and seller bought and sold notes, respectively. As to the effect of bought and sold notes a subject which will be treated of hereafter, see the cases noted below.[3]

His position and the effect of his contract has been pointed out by Brett, J. in *Fowler* v. *Hollins*.[4] "Properly speaking a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale; the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has not effect *as his*, but only because it is in contemplation of law, the signature of one or both of the principals. No effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation or assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed he passes it to the vendee. In so doing, he still does no more than act as a mere intervenor between the principals. He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the destination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether goods shall be delivered to the one, or kept by the other. He is throughout merely the negotiator between the parties; and, therefore, by the Civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there were some fraud on their part."

[19] Camp. on Ag., 424.

[20] See *Mollett* v. *Robinson*, L. R. 7. C. P., 97, *per Hannen, J.*

[21] *Sievewright* v. *Archibold*, 17 Q. B., 103. *Clarton* v. *Shaw*, 9 B. L. R., 245. *Cowie* v. *Remfry*, 3 Moo. I. A., 448. *Jumna Dass* v. *Sreenath Roy*, I. L. R. 17 Calc., 176 (note). *Mackinnon* v. *Shibchunder Seal*, Bourke's Rep. O. C., 354. *Tamvaco* v. *Skinner*, 2 Ind. Jur. N. S., 221.

[22] L. R. 7 Q. B., 616.

An Insurance broker, is a common agent between the assured and the underwriters. He is agent of the assured to effect the policy, "But he is not solely agent; he is a principal to receive the money (the praemium) from the assured, and to pay it to the underwriters."[1] He as being the person who effects the policy and who has become liable for the praemium, "has, for his labour, and care, and his money expended, a lien in the nature of holding possession of the policy against the owner of the goods for whose benefit the policy was effected, and against any intermediaries who may have intervened between the owner of the goods and himself";[2] but it appears that such a lien will not exist, where there is an antagonism between the contract made by the parties and the existence of a lien,[3] or in the absence of a contract to the contrary[4] and if he be employed immediately by the assured, this lien extends to the general balance due.[5] The policies effected by insurance brokers may either be a *voyage* policy, that is, one for a voyage or series of voyages; or *a time* policy,[6] that is, one effected for a particular period; or it may be a time policy with the voyage specified.[7] According to the ordinary course of dealing between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the praemiums to the broker, nor does the latter pay it to the underwriter But as between the assured and the underwriter the praemiums are considered as paid. The underwriter, to whom in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the praemium to the broker only, and he is a middleman between the assured and the underwriter.[8]

Factors.—A Factor or Commission Merchant is an agent to whom goods are consigned or delivered for sale by, or for, a merchant and others residing abroad or at a distance from the place of such sale, who usually sells in his own name without disclosing that of the principal;[9] and in return for his services receives a compensation called factorage or commission; he has a special property in the goods consigned to him and has a lien upon them.[10] His agency is usually conducted under *del-credere* commission, guaranteeing the solvency of the intending buyer, or undertaking for the due payment of the price realised

[1] *Power* v. *Butcher*, 10 B. & C., 329, (340), per Bayley, J.
[2] *Fisher* v. *Smith*, L. R. 1 App. Cas, 1, (5), per Ld Cairns.
[3] *Fisher* v. *Smith*, L. R. 1 App Cas., 1, (10), per Ld O'Hagan.
[4] Ind. Contr. Act, s. 171.
[5] *Olive* v. *Smith*, 5 Taunt, 56. See also *Westwood* v. *Bell*, 4 Camp., 349.
[6] *Dudgeon* v. *Pembroke*, L. R. 2 App. Cas., 284.
[7] *Gambles* v. *Ocean Marine Insurance Co. of Bombay*, L. R. 1 Ex. D, 3.
[8] *Power* v. *Butcher*, 10 B. & C., (340), *per Bayley, J.*
[9] *Baring* v. *Corrie*, 2 B. & Ald, 143. Ind. Contr Act, s. 230, par 2.
[10] Ind. Contr. Act, ss. 171, 221, *Baring* v. *Cowie*, 2 B. & Ald., 148. Per Holyrood, J.

on sales effected by him.[1] His character differs from a broker in that he may buy and sell in his own name or that of his principal, and in that he has possession and control of the goods which he buys or sells for his principal.[2] The character of factor and broker is frequently combined, the broker having possession of what he is employed to sell, or being empowered to obtain possession of what he is employed to purchase; but properly speaking in these cases he is a factor.[3] As a general rule a factor's possession and powers of disposal will not create reputed ownership.[4] The reason assigned is that as factors must by the usage of trade have the stock of other people in their possession, it does not therefore hold out a false credit to the world,[5] nor carry to the understanding of the world the reputation of ownership.[6] He has in the absence of a contract to the contrary a right to retain security for a general balance of account any goods bailed to him.[7] The powers and duties of factors in making consignments of their principals' goods were formerly determined by the general mercantile law,[8] and since the Indian Factor's Act has been repealed, will, it is submitted, be governed by the general mercantile law, so far as it is not inconsistent with the Indian Contract Act.

A del-credere agent like any other agent is to sell according to the instructions of his principal and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this—that he guarantees that the persons to whom he sells shall perform the contracts which he makes with them, and, therefore, if he sells at the price at which he is ordered to sell by the principal, then no doubt he guarantees to pay him at that time and he is bound, like any other agent, as soon as he receives the money to hand it over to his principal; but if, according to the contract between him and his principal, he is at liberty to sell at any price he likes, but is to be bound to pay over to his principal at a fixed price and at a fixed time, that is not the relationship of principal and agent.[9]

A ship broker is an agent or middleman between the mercantile and shipping communities for the purpose of procuring freight, and of negociating the sale and purchase of ships[10] and effecting charterparties.[11] His authority, unless it

[1] Add. on Contr. 701.

[2] *Baring* v. *Corrie*, 2 B. & Ald., 143, 35 L. J. Ex., 194.

[3] *Bell's Comm.*, Bk. III, Part I, Ch. III, p. 508.

[4] *Tooke* v. *Hollingworth*, 5 T. R., 226.

[5] *Bryson* v. *Wylie*, 2 B. & P. 83.

[6] *Horn* v. *Baker*, 9 East, 245, *Bells Comm.* Bk. III, Pt. I, Ch. III, p. 507.

[7] Ind. Contr. Act, s. 171.

[8] *Mutunjoy Chukerbutty* v. *Cockrane*, 4 W. R. P. C., 1.

[9] *Ex-parte White, re Nevill*, L. R., 9, Ch. 397; 6 Mad Jur., 275.

[10] *Maclachlan on Merchant* Shipping, 188.

[11] *Cross* v. *Pagliano*, L. R. 1 Ex. 6; *Allan* v. *Sundius*, 1 H. & C., 123. *The Nuova Raffaelina*, L. R. 3 A. & E., 483.

be express to that effect, never empowers him to conclude a contract without further reference to the principal, who on the contrary usually reserves an option, and may refuse to confirm his own terms, after they have been accepted by the other side.[1] Nor is the broker, if his duties are executed in such a manner that no benefit results from them, entitled to recover either his commission or even a compensation for his trouble, or if he misconducts the business, in respect to such part of the business as has been misconducted by him.[2] Nor will he be entitled to commission or even compensation unless the contract is completed, even though it be broken off by the owner;[3] if there should be a custom that he should receive commission on an uncompleted contract, it appears from these cases that he would be entitled to recover.

A Ship's husband is a confidential agent (usually a one part owner of a vessel, although he may be a stranger) appointed to conduct or manage on shore whatever concerns the employment of a ship; he has authority to give order for repairs, refitting and the outfit of the ship, to see that she is properly manned, to procure a charter or freight;[4] but not to cancel a charter party;[5] to correspond with the master when abroad on the business of the vessel, to provide for the entry and clearance at the home port, to adjust and receive freight, and to account for and distribute the proceeds among the owners.

Master of a ship—A master of a ship is an agent for shipowners "to do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged; but this authority does not usually extend to cases where the owner can himself personally interfere, as in the home-port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the thing required: ..... but if the vessel be in a foreign port, where the owner has no agent, or if in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner for such things as are necessary."[6] The extent of his powers will, however, be referred to later on.

Partners.—In an ordinary partnership each partner is the general agent of his co-partners for the transaction of the partnership business in the ordinary course; the scope of his general authority being determined by the kind of acts which are necessary from the nature of the business, or usually exercised by

[1] *Broad* v. *Thomas*, 4 C. & P., 338.

[2] *Hamond* v. *Haliday*, 1 C. & P., 384. Ind. Contr. Act, s. 220.

[3] *Broad* v. *Thomas*, 4 C. & P. 338; 7 Bing., 99. *Read* v. *Rann*, 10 B. & C. 438.

[4] See *Bells Comm.* Bk. III, Pt. III, Ch. IV, p 552; *Walton* v. *Fotherqill*, 7 C. & P., 392. *Maclachlan on Shipping*, 182.

[5] *Thomas* v. *Lewis*, L. R. 4 Ex. D. 18.

[6] *Arthur* v. *Barton*, 6 M. & W. 138, (143), per *Abinger*, C. B.

partners in carrying on similar businesses in the ordinary way.[1] But the members of a Company, whether incorporated or not, are neither partners nor the agents of the Company.[2]

Partners in ancestral trade.—Partnership in an ancestral trade belonging to an undivided Hindu family, has been held not to be an ordinary partnership; and the rights and liabilities arising between the members of such a family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu law, which regulate the transactions of united families.[3] The partnership so created, has many, but not all of the elements existing in an ordinary partnership; for example, the death of one of the partners does not dissolve the partnership; nor, as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses.[4]

Directors.—Directors of a Company are special, not general agents, the limits of their authority being defined by the instrument constituting the Company, which, under the Companies Act of 1882, are accessible to the public and of the provisions of which all persons dealing with such Company are held to have notice.[5]

The Kurta of a Hindu joint family.—The Kurta of a Hindu joint family has been said to be "the mere mouthpeice of the family, and not an agent with delegated authority in a fiduciary and accountable relation to the rest of the family,"[6] but this decision so far at least as the Kurta's accountability is concerned, is not now law.[7] In a Madras case,[8] the Kurta of a joint family is said to be "the agent for the other members, and is supposed to have their authority to do all acts for their common necessity or benefit." In the case last cited Kernan, J., points out the distinction between the legal position of a Polygar and that of a Kurta;" the legal position of a Zamindar or of a Polygar has been defined to be that of an undivided member of a Hindu family subject to the law of the Mitákshará in possession of the estate, held by him free from coparcenary rights in others, but not entirely at his own disposal. He possesses

[1] Campb. on Ag., 490; *Dickenson* v *Valpy*, 10 B. & C., 128; *Brettel* v. *Williams*, 4 Ex., 623; *Stead* v. *Salt*, 3 Bing, 101.

[2] *Burnes* v. *Pennell*, 2 H. L. Cas., 497.

[3] *Samalbhai Nathubhas* v. *Someshvar Mangal*, I. L. R 5 Bom., 38, (40).

[4] *Ramlal Thakursidas* v. *Lakmichand*, 1 Bom. H. C. App., 51, but see *Obhoychunder Roy* v. *Peareemohun Gooho*, 13 W. R. F. B. 75.

[5] *Ernest* v. *Nicholls*, 6 H. L. Cas., 401, *Balfour* v. *Ernest*, 5 C B N.S., 601, Crawl. on Ins., 194.

[6] *Chuckun Lall Singh* v. *Poranchandra Singh*, 9 W. R, 483.

[7] *Obhoychunder Roy Chowdhry* v *Peareemohan Gooho*, 13 W. R. F. B., 75.

[8] *Kotta Ramasami Chetti* v. *Bangari Seshama Nayanivera*, I. L. R. 3 Mad., (150).

only qualified powers of disposition of a managing member of a joint family.[1] The position of such a Zamindar or Polygar as an undivided member of a joint family seems to be essentially different from that of an ordinary managing member of an undivided Hindu family. In the latter case, all the undivided members have coparcenary rights, the right, in ancestral common estates, to participation in the annual produce of the estate, also the power of restraining waste or misapplication of such produce, also power of calling for accounts of the estate and partition and of having a separate share allotted. The manager of such joint family is the agent for the other members, and is supposed to have their authority to do all acts for their common necessity or benefit. A creditor, dealing with such a manager, has a reasonable ground to give credit to the acts of the manager in all matters, apparently and ordinarily within the scope of the authority of a manager. In the case of a Polygar member, he is entitled to the exclusive receipt and use of the income from the estate during his life, he cannot be called on to account for the disposal of such income; his savings from it are exclusively his own. He cannot be called on to divide the estate or any part of it with the individual members of his family. *Primâ facie* the money he borrows, except on mortgage of the estate, is raised on his own personal credit for his own benefit and purposes, and not on the credit of the family estate, or for the purposes or benefit of the family. The rule requiring a lender to satisfy himself of the existence of family necessity, or of the family benefit which justifies the manager in raising such a loan on the security of the family estate, could not be satisfied, in the case of a dealing with a Polygar, by inquiries which would be sufficient in the case of an ordinary manager. In the latter case a lender finds a manager acting as the agent of all the members. In the case of a Polygar, the lender finds a so-called manager acting not as agent of the family or for them, but for himself for all ordinary purposes, and practically only representing the other members of the family to preserve the *corpus* of the estate from injury or loss."

Vakils.—A Vakil or pleader is a legal practitioner combining in his own person the two duties performed in England by barristers and attorneys; that is to say, he may appear as an advocate in a suit, and may also carry out the administrative work arising out of such suit. So far as the Courts are concerned, the legislature has to a great extent made the pleader an officer of the Court, and he is therefore answerable to it.[2] He, if entered and enrolled as a vakil on the roll of a High Court under the Letters Patent constituting such Court, is entitled to practise in all the Courts subordinate to the Court on the roll of which he is entered, and in all Revenue offices within the local limits of the appellate

[1] *Gavridevamma* v. *Ramandora*, 6 Mad. H. C., 93.

[2] In the matter of *Khoda Bux Khan*, I. L. R. 15 Calc. 638.

jurisdiction of such Court; and when so entered and ordinarily practising in the Court in which he is enrolled or some Court subordinate thereto, he may practise in any Court in British India other than a High Court on whose roll he is not entered, and with the permission of the Court, in any High Court on whose roll he is not entered and in any Revenue office. He, however, has no right to appear and act in the Courts of Original Jurisdiction in Presidency towns.[1] He is further subject to the rules (if any) made under Part III of the Legal Practitioners Act declaring his powers, duties and functions. That Act extends in the first instance to Bengal, the North-Western Provinces, the Punjab, Oudh, and the Central Provinces and Assam only. He is, if a vakil of a High Court, entitled to practise in the Court of the Recorder of Rangoon and of the Judicial Commission of British Burmah and in Courts subordinate to those functionaries.[2] He cannot, however, practise in the Privy Council.[3]

Muktars.—A Muktar, is a legal practitioner, recognized by the legislature; when admitted as a certified muktar in accordance with the Legal Practitioners Act, he may, subject to the provisions of the Criminal Procedure Code, appear to plead and act in any civil or criminal Court mentioned in his certificate.[4] He is subject to the control of the High Court. His duties and functions are regulated by the Legal Practitioners Act and the rules passed thereunder.

Revenue-Agents.—A revenue-agent is a legal practitioner within the meaning of Act XVIII of 1879. He is a certificated agent under the control of the Chief Controlling Revenue Authority, authorized to practise in such Revenue offices as are specified in his certificate. If admitted as such agent previously to the year 1880 and holding a certificate he may, in Bengal, be enrolled and appear in any Munsiff's Court, and plead and act in rent suits under the Rent law for the time being in force.[5] His duties, powers and functions are regulated by the Legal Practitioners Act, and the rules made or to be made thereunder.[6]

APPOINTMENT OF AGENTS.

No person can become agent save by the will of principal.—"No one," says Lord Cranworth, "can become the agent of another except by the will of that other; his will may be manifested in writing or orally, or simply by placing another in a situation in which, according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who

[1] Act XVIII of 1879, s 4

[2] Act XVII of 1875, s 84, 87.

[3] In re *Tweedale's petition*, L R 14 App Cas, 328.

[4] Act XVIII of 1879, Pt. III.

[5] Act XVIII of 1879, Pt. IV

[6] *Ibid*, s. 10.

has so placed him, but in every case it is only by the will of the employer that an agency can be created."[1] This proposition is not however at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that belief, then unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed; and this doctrine is designated as an agency by estoppel. And there appears also to be a further exception to the rule that no one can become an agent of another except by the will of that other, and that is, in those cases in which a compulsory agency is created by law, namely, in those cases in which the law authorizes a wife to pledge her husband's credit even against the will of her husband.[2]

The appointment may be express or implied.—The authority of an agent may be either express or implied,[3] and further it may arise from ratification. It is said to be express when it is given by words spoken or written, and implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing may be accounted circumstances of the case.[4] Express appointments may take the form either of some formal written instrument under seal, or otherwise, such as a power of attorney; or of some informal written instrument, such as a letter of instruction, or a written or oral request.

First as regards an appointment under seal.—In this country such a form of appointment is unusual; for a contract under seal has no greater efficacy than a simple contract, there being no more presumption of consideration in the one case than in the other. There are, however, some cases in which a contract is required to be made under seal, and in such cases the appointment of an agent to carry such contract out should also be under seal.[5] This rule is founded by analogy on the maxim of the Common law, that a sealed contract can only be dissolved and released by an instrument of as high a dignity or solemnity; eodem modo quo oritur, eodem modo dissolvitur.[6]

Corporations being artificial bodies, can only contract through agents;[7] and although there are many cases in which a Corporation can under statute contract

[1] *Pole* v. *Leask*, 9 Jur. N S. 829. See also *Gungapershad* v. *Ajoodhia Pershad*, Agra H C (F. B. Rul.), 23.

[2] *Johnson* v. *Sumner*, per Pollock, C B 3 H. & N., 261

[3] Ind. Contr. Act, s. 186.

[4] Ind Contr. Act, s. 187.

[5] *Co. Litt*, 48, b. *Coombes's Case*, 9 Co., 75. *Harrison* v. *Jackson*, 7 T. R. 207. *Hunter* v *Parker*, 7 M. & W., 342. *Young* v. *Leamington Corporation*, L. R. 8 Q. B. D., 579, (584).

[6] *Bacons Abrid*, "*Release*," *Hunter* v. *Parker*, 7 M & W., 342.

[7] *Fergusson* v. *Wilson*, L. R. 2 Ch, 89.

otherwise than under seal, yet there are some cases in which it may be necessary for it to do so. For instance, where a body corporate is created under charter, or under a particular statute which does not expressly declare the manner in which it is to contract, such Corporations would fall within the general rule of the Common law and the exceptions allowed thereto, next mentioned.

Rule of Common Law.—The old rule applicable to such bodies was, that they could only bind themselves by their common seal. This rule, however, has in modern times been greatly relaxed, and at the present day admits of certain well-established exceptions, which may be roughly stated to be based on the principle of "convenience amounting almost to necessity."[1]

Exceptions to the rule.—The exceptions to which I referred, have been of gradual growth, arising chiefly from the extension of trade dealings; and although, as has been stated by a learned judge, the cases in which the principle has been applied "require review and exposition by a Court of appeal,"[2] yet this as yet has not been done, and it appears clear that the principle running through all these decisions is, "convenience amounting to necessity."

In *Beverley* v. *Lincoln Gas Light Co.*[3] Paterson J., says:—"At first the rule appears to have been exclusive, as indeed, its principle required it to be. A Corporation it was said being merely a body politic invisible, subsisting only by a supposition of law, could only act or speak by its common seal, the common seal was the hand and mouth of the Company. This rule stood not upon policy, but on necessity, and was at first equally applicable to small as to great matters, to acts of daily or rare occurrence, to what regarded personal as well as real property, but this though true in theory was intolerable in practice; the very act of affixing the seal, of lifting the hand, or opening the mouth could only be done by some individual member, on theory quite distinct from the body politic, or by some agent; the performance of the very duties for which the Corporation was created, required incessantly that acts should be done, sometimes of daily occurrence sometimes entirely unforeseen yet admitting of no delay, sometimes of small importance, or relating to property of little value. The same causes also required that contracts to a small amount should often be entered into. In all these cases to require the affixing of the common seal was impossible, and therefore from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule, and what we desire to draw attention to is this—that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle and justified only by necessity." Again Lord Denman in delivering the judgment of the Court

[1] *Church* v. *Imperial Gas Co.*, 6 A. & E., 846, (861).

[2] *Young* v. *Corporation of Leamington Spa.*, L. R. 8 Q. B. D., 579 (584).

[3] 6 A. & E., 838.

in *Church* v. *The Imperial Gas Light Co*[1] says "the general rule of law is that a Corporation contracts under its common seal; as a general rule it is only in that way that a Corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference is to exclude from this exception This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the Corporation was created, the exception prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions." This judgment received the sanction of the Court of Exchequer in the *Major of Ludlow* v. *Charlton*.[2]

The exceptions, applicable to trading Corporations[3] are well laid down in the case of *South Ireland Colliery Co.* v. *Waddle*.[4] Byles J., on this point, says:—

"Originally all contracts by Corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like. But in progress of time, as new descriptions of Corporations came into existence, the Courts came to consider whether these exceptions ought not to be extended in the case of Corporations created for trading and other purposes. At first there was considerable conflict; and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions, which if inconsistent with them, must, I think, be held not to be law. These exceptions apply to all contracts by trading Corporations entered into for the purposes for which they are incorporated A Company can only carry on business by agents, managers and others; and if contracts made by these persons are contracts which relate to objects and purposes of the Company, and are not inconsistent with the rules and regulations which govern their acts, they are valid and binding upon the Company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The

[1] 6 A. & E. 846 (861.)

[2] 6 M. & W., 822.

[3] As to the distinction drawn between trading Corporations and Municipal Corporations in this class of cases, see *Wells* v. *Kingston, upon Hull*, L. R. 10 C. P., 402.

[4] L. R. 3 C. P., 463, (468).

authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of a contract for £50,000 or £1,000,000." His Lordship then referred to *Henderson* v. *Australian Royal Mail Steam Navigation Co*[1] in which case Wightman J., said with reference to the case of *Clarke* v. *Cuckfield*,[2] 'that the general rule, that a Corporation aggregate cannot contract except by deed, admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the Corporation was created. But in later times the decisions have sanctioned a much more extensive relaxation, rendered necessary in consequence of the general establishment of trading Corporations. The general result of those cases seems to me to be, that whenever the contract is made with relation to the purposes of the Corporation, it may, if the Corporation be a trading one, be enforced, though not under seal.' And Erle J., in the same case added 'I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. No doubt when the exception originated, it was applied only to small matters, such as the appointment of servants, being all that Municipal Corporations required. But as soon as it became extended to trading Corporations it was applied to drawing and accepting bills to any amount, and this shews that insignificance is not an element. Neither I think is frequency. The first time a Company makes a contract of any kind, that contract must have been unprecedented. The question is, I think, whether the contract in its nature is directly connected with the purpose of the Corporation.' And after citing the opinion of Crompton J., in the same case 'that a modern incorporation incorporated for trading purposes may make binding contracts in furtherance of the purposes of their corporation without using their seal,' referred to the *Australian Royal Mail Steam Navigation Co.* v. *Marzeth*[3] in which Pollock C. B. said, 'It is now perfectly established by a series of authorities, that a Corporation may, with respect to those matters for which they are expressly created, deal without seal,' added "These principles are now too firmly settled to be shaken," stating that "if the case of *London Dock Co.* v. *Sinnott*[4] is not distinguishable it was contrary to the other cases, and was certainly not intended to throw any doubt upon them." Sir Montague Smith J., in the same case[5] says on the point, "The general rule, no doubt, is that a corporation contracts under seal But from very early times, exceptions have been allowed in the case of Municipal and Ecclesiastical Corporations to enable them, without

[1] 5 E & B., 409
[2] 21 L J. Q B, 349.
[3] 11 Ex, 228.
[4] 8 E & B., 347
[5] *South of Ireland Colliery Co.* v. *Waddle*, L. R. 3 C. P., 474.

the formality of a seal, to transact matters of minor importance and of daily occurrence. In the case of trading Corporations, these exceptions have been step by step extended, and have now grown larger than the rule. The modern doctrine, as I understand it, is, that a Company which is established for the purpose of trading may make all such contracts as are of ordinary occurrence in that trade without the formality of a seal, and that the seal is required only in matters of unusual and extraordinary character, which are not likely to arise in the ordinary course of business."

Such exceptions have been recognized in this country in *Stewart* v. *Scinde Punjab and Delhi Ry. Co.*[1] Phear J., says:—"It seems to me then perfectly clear, that the defendant is a corporate body provided with a common and special seal, and so situated, that it generally can contract only under seal, or by the particular mode which is statuably provided by the Companies Clauses Consolidation Act; I say generally, because there is of course a class of cases which are in some degree exceptional, and in which the Company as a Corporation can bind itself otherwise than under seal, or in accordance with the statuable provisions of the Companies Clauses Act. I refer to that particular class of cases, in which the common law of England will hold a Corporation to be bound by a contract, notwithstanding that it is not made under seal; but these are cases, where the matter of the contract belongs to the ordinary every-day business of the Corporation, and is of such a character that it would be the cause of vexatious harassment to insist upon the contract being made with all the formalities which necessarily attach to the affixing of the seal of the Corporation."

It must, however, be remembered that these exceptions will have no application to the contracts of any body corporate constituted by particular statute, where the statute itself prescribes that a contract may be carried out without seal, or where it expressly prescribes that a contract shall be in writing sealed with the Common Seal of the Company.[2]

Contracts by Corporations.—The greater portion of corporated bodies in this country have been incorporated under the Indian Companies Acts of 1866 or 1888; under s. 67 of which latter Act, Companies are placed on the same footing as private persons with regard to the form of their contracts; and contracts under their common seal, or made in writing, or by parol through their agents have the same validity as contracts in a similar form between private persons. Other corporated bodies have been incorporated under special Acts such as the Presidency Banks Act, the different Municipal Acts of the different Presidencies, and their Mofussil districts, and the Calcutta Port Commissioners Improve-

[1] 5 B. L. R. 195, (201), on appeal, 211.

[2] *Hunt* v. *Wimbledon Local Board*, L. R. 3 C. P., 268; L. R. 4 C. P., 4.

ment Act. Under the Indian Companies Act, and the Presidency Banks Act, all such Companies or bodies corporate, may, except as regards the contracts specified in sub-section (1) of s. 67 (*a*) of the former Act, and s. 9 (*a*) of the latter, contract without seal, apart from the rule of law referred to above as pointing out the exceptions to the general rule that a corporate body can only contract by seal.[1]

Contracts by Municipal Corporations created under Special Acts.—With regard to Municipal Corporations created under the different Acts in force in the several Presidency towns,[2] there are in such Acts express provisions for the use of a common seal in the execution of certain contracts. Questions as to whether similar provisions made in English Acts, are mandatory or directory only, have arisen, deciding, however, that such provisions are mandatory. Such a question arose in the case of *Young* v. *Corporation of Leamington Spa*,[3] in this case, arising under s. 174 of the Public Healths Act of 1875, the defendant Corporation by a power under seal appointed an engineer to enter into a contract with one Powis to construct certain water works. The engineer entered into a contract under seal with Powis for this purpose, one of the terms of such contract being that if he, Powis, should fail to complete the works, the engineer might employ some one else to complete the work at Powis's expense. Powis made default, and the engineer thereupon employed the plaintiffs to finish the work and to execute certain additional works, this engagement was not made under seal. The plaintiffs executed the works and the defendants had the benefit of such works and approved the contract of their engineer. The Statute under which the Corporation was acting directed that "every contract entered into by an Urban authority, whereof the value of, or amount exceeded £50 shall be in writing and sealed with the common seal of such authority." The plaintiff sued to recover on his contract which was one for a sum over £50.

It was contended that the contract was in substance and effect under seal of the defendants, because the engineer was appointed by the defendants under seal to perform certain powers and duties which included the exercise of the rights reserved in Powis's contracts to the defendants' engineer, and to the duty of seeing to the proper execution of the works contracted for by Powis, and because, upon the engineer's report the additional work was approved by the Corporation. The Court said that to so hold because the engineer was appointed under seal and his report adopted, would be to hold that the defendants might lawfully delegate an important part of their duties to one of their officers and

[1] See *Palmers Comp. Preced.*, pp. 79, 80.

[2] Beng. Act, II of 1888, s. 62, Madras Act I of 1884, s. 50, Bom. Acts III & IV of 1888.

[3] L. R. 8 Q. B D., 579. See also *Eaton* v. *Basker*, L. R. 6 Q. B D., 201; and the judgment of Baggaley, L. J., in L. R. 7 Q. B. D., 533.

so deprive the ratepayers of the protection provided by the legislature for them. It was also contended by the plaintiff Young that as the contract had been performed and the defendant had the benefit of the plaintiffs' work and labour and material, the defendants were, at all events, liable to pay for them at a fair price. As regards that contention, Lindley L. J., said[1]—"In support of this contention cases were cited to show that Corporations are liable at Common Law *quasi ex contractu* to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and exposition by Court of appeal. But in my opinion the question thus raised does not require decision in the present case. We have to construe and apply an Act of Parliament. The Act draws a distinction between contracts for more than £50 and contracts for £50 and under. Contracts for not more than £50 need not be sealed, and can be enforced whether so executed or not, and without reference to the question whether they could be enforced at Common law by reason of their trivial nature. But contracts for more than £50 are positively required to be under seal, and in a case like that before us, if we were to hold the defendants liable to pay for what has been done under the contract, we should in effect be repealing the Act of Parliament, and depriving the ratepayers of that protection which Parliament intended to secure for them ....." In a revised judgment which is to be found cited in L. R. 8 App. Cases 552. Brett L. J., said; "I come to the same conclusion as Lord Justice Lindley and Lord Justice Collett in this case, upon the ground that although there was a Municipal Corporation, yet in the transaction in question it was acting as a board of health, and that therefore it was bound by the Statute, and that as to the construction of that Statute we are bound by a former decision of this Court *Hunt* v. *Wimbledon Local Board*,[2] which held that the enactment as to the necessity of a seal is mandatory and not merely directory. Therefore assuming that everything was done according to the Statute, except the seal, and that the work was done after every enquiry had been made by the Corporation which is directed by the Statute, I am of opinion that this mere want of a seal prevents the plaintiff from recovering in this action. Further, after having read all the cases with regard to the doctrine of work done for and accepted by a Corporation, I am bound to say, that I have come to the conclusion that even if this were a Municipal Corporation not bound by the Statute, the proper decision in point of law according to the cases and principle, is that the want of seal prevents, in such case as this, the plaintiff succeeding." In the House of Lords[3] Blackburn L. J. in delivering judgment said; "I agree in what

[1] L. R. 8 Q. B. D., (585).
[2] L. R. 4 C. P. 48.
[3] L. R. 8 App. Cas, 517.

Lindley L. J., says, that the cases are numerous and conflicting, and that they require revised and authoritative exposition by a Court of appeal. If I thought this case now at bar gave an opportunity for such a review, I should certainly wish at least to hear the case fully argued. As it is, I do not think it necessary, and therefore do not think it right to examine the previous decisions and doubts further than is required for the purpose of construing the Public Health Act 1875, s. 174; ..... I think, however, that when we look at the state of the decisions existing in 1875, and what was the point on which, I think there was a difference of opinion sufficiently marked to make it uncertain what the ultimate decision of the Supreme Court of Appeal upon them might be, and then inquire what was the intention of the legislature in passing this enactment, it is impossible to construe it in the manner ingeniously suggested."

His Lordship then cited the view of the law expressed in *Church* v. *Imperial Gas Co.*[1] and in the *Mayor of Ludlow* v. *Charlton*;[2] and continued, "So far there is no difference between the Courts of Exchequer and of Queen's Bench as to the law, though there was evidently room for considerable difference as to its application. I pass by many subsequent decisions, and only quote two. In 1852 *Wightman, J.*, sitting alone in the Bail Court, decided *Clarke* v. *Cuckfield Union*,[3] on the ground I think that a poor law Union, created by Statute, for the purpose, amongst others, of supporting the paupers in a workhouse, could not be required to affix their seal to every contract for things necessary for that purpose without such inconvenience, as would defeat the object within the principle laid down in *Church* v. *Imperial Gas Co.*"

"In 1855 in *Smart* v. *Guardians of the West Ham Union*,[4] *Parke and Alderson B. B.*, each expressed dissent from *Clarke* v. *Cuckfield Union*. They could not, as they were not in a Court of Error, overrule it, but undoubtedly questioned it. In 1866, in *Nicholson* v. *Bradfield Union*,[5] where the Union had bought coals to keep paupers warm, the Court of Queen's Bench, in a considered judgment say 'The case of *Clarke* v. *Cuckfield Union* is in its facts undistinguishable from the present case. We are aware that very high authorities have questioned the soundness of that decision; and as pointed out in the judgment in that case, there are prior decisions in the Court of Exchequer which it is difficult to reconcile with it. We think, however, that as far as it extends to such a case as the present at least, the case was rightly decided. There may be cases in which the circumstances are different from those in *Clarke* v. *Cuckfield Union* and the present case, and which would still be governed by the principles laid down in the decisions in the Exchequer; those we leave to be decided when they arise; but so far as those prior decisions are inconsistent with the decision in *Clarke* v.

[1] 6 A. & E., 861
[2] 6 M. & W., 815
[3] 21 L. J. Q. B., 349.
[4] 10 Ex., 867.
[5] L. R. 1 Q. B., 620, (627).

Cuckfield Union, we prefer to follow the authority of *Clarke* v. *Cuckfield Union*, which we think founded on justice and convenience.' "There was not I believe any decision on this question between 1866 and 1875. The legislature in the earlier part of the Act of 1875 had incorporated all Urban Authorities which were not already Corporations; those which were already Corporations continued such; and then in Part V of the Act it makes provisions as to contracts. We ought in general in construing an Act of Parliament, to assume that the legislature knows the existing state of the law; and I have no doubt that in fact those who prepared the Act of 1875, knew of the differences of opinion that had been expressed, and the difficult questions which might yet have to be decided, and really intended to provide that those difficulties should not arise with respect to the Urban Authorities they were creating. I think, bearing in mind this, it is not possible to construe s. 174 as meaning anything else than that when the subject matter of a contract exceeds £50 in value the contract must be under seal; and that the distinction and differences which, according to the opinions of the Court of Queen's Bench, might dispense with a seal in the case of an ordinary Corporation should not do so when the contract was by an Urban authority, and related to a subject matter above that value. This was the construction put upon the act in *Hunt* v. *Wimbledon Local Board*[1] as well as in the Court below.[2] I think it is right and disposes of this appeal."

The remarks made by these learned judges apply with the same force to the several sections of the different Municipal Acts to which I have referred.

Appointment of agents by formal document not under seal.—Next as regards the appointment of agents by formal document not under seal. Such as a power of attorney. This is a very ordinary mode of appointment in this country, and especially so in the case of private individuals leaving India temporarily and entrusting their affairs to others.

Cases in which appointment must be in writing.—And although, as will be seen, an appointment of an agent can be made otherwise than by power of attorney, there are some few cases in which it is absolutely necessary that a written power should be given; for instance, the appointment of a pleader to act and plead in a Court must be in writing.[3] So also the appointment of an agent to present documents for registration.[4] So also the appointment of an agent to transact business on behalf of another with a custom house officer;[5] so also the appointment of a proxy to vote at a meeting held under the Presidency Banks Act;[6] so also the appointment of a proxy to vote at a meeting of a Company;[7] so also the appointment of an agent for the purposes of the Inven-

[1] L. R. 4 C. P. 48.
[2] L. R. 8 Q. B. D., 579.
[3] Act XIV of 1882, ss. 37, 39, 41, 465
[4] Act III of 1877, s. 32
[5] Act VIII of 1878, s. 203.
[6] Act XI of 1876, s. 57.
[7] Act VII of 1882, s. 37, Table A. para. 49.

tions and Designs Act of 1888.[1] But in the mercantile word the most usual form of appointment of an agent is by some informal written instrument, such as a letter of instructions, or a written request where the principal and the agent do not reside in the same place.[2]

Other modes of appointment.—But where there are opportunities of personal intercourse, a verbal request is common. Appointment may further be made by implication from the recognition of the principal[3] or from his acquiescence in the acts of the agent.[4] Illustrations of which authorities fall more properly under the head of the nature and extent of the authority of the agent.

Partners.—There is no necessity for, nor is there usually any formal mode of appointing one partner agent of his co-partners. Each partner has implied authority to do what is necessary to carry on the partnership business in the usual way. The agency of each partner commences with the partnership, and not before, even though an agreement, not amounting to a partnership deed, may have been entered into ;[5] nor will the agency be implied as long as there remains anything to be done before the right to share in the partnership accrues.[6]

[1] Act V of 1888, s. 47.

[2] Petgrave on Pr. & Ag., p. 12.

[3] Story on Agency 55 : *Mulchand Chutumal* v. *Sundarji Naranji*, 7 Bom. H. C., (*O. C.*), 39 *Koora* v. *Robinson* 2 *Agra*, II. C. Misc., 2.

[4] *Ward* v. *Evans*, Salk , 442, 2 Ld. Raym, 930.

[5] *Edmunston* v. *Thompson*, 2 F. & F , 564 ; *Gabriel* v. *Evill*, 9 Mod., 207, but see *Battley* v. *Lewis*, 1 M. & Gr., 155.

[6] *Howell* v. *Brodie*, 6 Bing. N. C., 44, *Price* v. *Groom*, 2 Ex., 5.

LECTURE II.

PART I. JOINT PRINCIPALS, SUB-AGENTS, SUBSTITUTES, AND JOINT AGENTS.

PART II. DELEGATION.

Appointment by joint principals—Co-parceners—Hindu joint family—Co-sharers—Joint tenants—Partners—Co-owners—Part-owners of ships—Committees of Clubs—Appointment of Sub-Agents—Substitutes—Joint Agents—Delegation—General rule—Application of doctrine to Legislative Authority—No delegation of judicial authority, By arbitrators—By Civil Court to Ameens—By Karnavan—Distinction between delegation of Judicial and Ministerial Acts—Exceptions to general rule—Custom of Trade—How far Custom controls contract—Delegation by Trustees—Presumptions of delegation—Delegation under Statute.

PART I.

Joint Principals.—The power of appointment of agents may be in one person, or in more than one jointly and severally, or in more than one jointly. It rests with a number of individuals in those cases where the conjoint action of all is necessary for the purpose of carrying out the subject matter of the agency. When there are two or more principals having a distinct interest, the general rule is, that no one or more of them can ordinarily appoint an agent for the others without the consent of all.[1] But whatever a man may do of his own right and on his own behalf he may do by agent, and therefore if one or more of several joint principals may of his own right act on behalf of the other principals, he may appoint an agent on their joint behalf.[2] The converse of that rule, will aid in determining where the power of appointment lies. Where the interest of all the principals is common, and each is authorized to act for all, either may ordinarily appoint an agent whose acts will be the acts of all, but in those cases where the interest of each is several, and in those cases where the subject matter of the agency can only be attained by the united act of all, neither can bind the others by the appointment of an agent.

Co-parceners.—As to the position of co-parceners as principals they are connected together by unity of interest and unity of title. Each co-parcener although having unity, has not entirety of possession;[3] and each may join in a

[1] Story, 38. *Ubilack Rai* v. *Dalial Rai*, I. L. R. 3 Calc., 557.

[2] Evans on Principal & Agent, p. 31.

[3] 2 Bl. Comm., 182. Co. Lit., 164 (*a*).

lease, or may make a lease of his own share, if they join, it operates as with tenants in common, as the separate demise by each of his share. They cannot, however, sue separately for a portion of the rent, Thus in *Decharms* v. *Horwood*[1] where one co-parcener sued separately for his share of rents, Tindal C. J., said:—"We are clearly of opinion that the plaintiff cannot support an action for money had and received for a third part of the rents in question ..... The authorities all agree that whatever be the number of parceners, they all constitute one heir. They are connected together by unity of interest, and unity of title, and one of them cannot distrain without joining the others in the avowry ..... If they cannot distrain separately, how can they separately claim a portion of the rent from a person who has received it in the character of a trustee? It would be great hardship on him the tenant to be exposed to three actions instead of one But it might happen that one co-parcener might have received authority from the other parceners. Inasmuch therefore, as there has been no division of these rents, nor any agreement by the defendant to hold one third of them separately for the plaintiff, he has no right separately to sue the defendant."

Hindu Joint family —Members of a joint Hindu family are co-parceners,[2] and a single member has no right to sue alone to recover possession of the family property.[3] And one member, therefore, unless he is the Kurta appointed by all, cannot deal with the family property.[4] Nor can the rent of a joint undivided tenure be enhanced on the strength of an ekrah executed by one co-parcener, only.[5] The Kurta therefore if acting with the consent of all the members may appoint an agent to act for all. But if there is no Kurta to the joint family the one member of such family would be unable to appoint an agent for the others.

Co-sharers —There are numerous cases showing that one co-sharer in a joint estate cannot act alone, save with the consent of the other co-sharers. A few instances will, however, suffice; thus, the mere circumstance of the existence of a debt due from all the co-sharers in a joint estate will not of itself be enough to confer authority on some of several co-sharers to dispose of the other share,[6] nor can one of several co-sharers of a joint estate sue in respect of the particular share to get rid of a mortgage granted jointly by all the

[1] 10 Bing, 526.

[2] See *Kotta Ramasami Chetti* v *Bangari Seshama Nayanivaru*, I. L R 3 Mad 145, (150). Tagore Lectures for 1885, p 256

[3] *Gokool Pershad* v *Etwaree Mahto*, 20 W. R 138, (a Mitakshara case).

[4] See *Ramsebak* v *Ramlall Koondoo*, I L R 6 Calc, (826)

[5] *Hemayetoolah Chowdhry* v *Nil Kanth Mullick*, 17 W R, 139

[6] *Mahomed Faiz Ali Khan* v *Gunga Ram*, 1 Agra H. C., 112

co-sharers.[1] Nor can one co-sharer only sue to recover possession of his separate share,[2] nor can one co-sharer only sue for arrears of rent.[3] Although where there is an arrangement for separate payment of rent to the co-sharers, one co-sharer may sue alone.[4] Nor can one co-sharer enhance the rent of his share in a joint estate.[5] And as it is a well-known principle of law that whatever a man may do in his own right he may do by agent, it is clear that in the cases above referred to no one co-sharer could alone appoint an agent for the purposes above-mentioned unless his co-sharers joined with him in the appointment.

Joint Tenants.—Joint tenants of property have, with respect to all other persons than themselves, the properties of a single owner. Every joint tenant is seized or possessed of the joint property *per my et per tout*, that is, by every part and by the whole.[6] By this is meant that the possession of each is indivisible, and that each has an equal right, so that no one can claim the exclusive possession of any particular part of the property, though each is entitled to his proportion of rents.[7] A notice to quit signed by one of several joint tenants on behalf of the others is sufficient to determine a tenancy from year to year as to all. Lord Tenterden C. J., has said as to this :—"Upon a joint demise by joint tenants upon a tenancy from year to year, the true character of the tenancy is this, not that the tenant holds of each the share of each so long as he and each shall please, but that he holds the whole of all so long as he and all shall please. And as soon as any one of the joint tenants gives a notice to quit, he effectually puts an end to the tenancy; the tenant has a right upon such a notice to give up the whole, and unless he comes to a new arrangement with the other joint tenants as to their shares, he is compellable so to do."[8] The appointment of an agent, however, by one of them will bind only that one unless the others subsequently assent thereto.

[1] *Unjooor Singh* v. *Fusbooneesa*, 2 Hay, 155.

[2] *Golabjan* v. *Moshiatoolah*, 1 C. L. R. 537. *Reily* v. *Hurchunder Ghose*, I. L. R. 9 Calc., 722; 12 C. L. R., 398.

[3] *Unnoda Pershad Roy* v. *Erskine*, 12 B. L. R., F. B. 370: 21 W. R., 68, *Annodachurn Roy* v. *Kally Coomar Roy*, I. L. R. 4 Calc., 89; 2 C. L. R., 464, *Indromonee Barmonee* v. *Surroopchunder Paul*, 12 B. L. R. 29, (note); 15 W. R., 395.

[4] *Lootfulhuck* v. *Gopeechunder Mozoomdar*, I. L. R. 5 Calc., 941; 6 C. L. R. 402, *Guni Mahomed* v. *Moran*, I. L. R. 4 Calc., 96; 2 C L. R., 371.

[5] *Guni Mahomed* v. *Moran*, supra. *Rajchunder Mozoomdar* v. *Rajaram Gope*, 22 W. R. 385. *Rajendronarain Biswas* v. *Mohendrolall Mitter*, 3 C. L. R. 21. *Bharutchunder Roy* v *Kally Dass Dey*, I. L. R. 5 Calc., 574. *Kalichandra Singh* v. *Rajkishore Bhuddro* I. L. R. 11 Calc. 615, but see *Rashbehari Mukerji* v. *Sakhi Sundari Dasi*, I. L. R. 11, Calc. 644.

[6] Litt., 288.

[7] Will. Real Property, 134.

[8] *Doe d. Ash* v. *Summersett*, 1 B. & A., 135, see also *Kindersley* v. *Hughes*, 7 M. & W., 139.

Partners.—A partner is a joint tenant with his fellow partners of the property of the firm; and in respect that there is a joint tenancy of the property of the firm, partners are obliged to be joined in suing; and for the purpose of being sued.[1] Partners, being also the general agents of one another, will, of course, each be liable for the acts of the others of them, the act of one of them within the scope of the partnership business being binding upon the others; one partner may therefore within such limits employ an agent and his appointment will bind the firm.

Co-owners.—But co-owners are not similarly always agents of one another, although the border line between co-owners and partners is narrow. Examples of this difference are given by Mr. Lindley in his work on partnership,[2] he says, "If several persons jointly purchase goods for resale with a view to divide the profits arising from the transaction, a partnership is thereby created;[3] but persons who join in the purchase of goods not for the purpose of selling them again and dividing the profit, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties as if they were."

Persons concurring in giving a joint order for one parcel of goods.—Two persons who are not partners but who concur in giving an order for one undivided parcel of goods, are not jointly liable to the seller, if upon the whole transaction the intention of the parties appears to have been that the buyers should be severally responsible for the amount of their respective interests in the goods. Thus in *Gibson* v. *Lupton*[4] the defendant Lupton, being an oil merchant, and the defendant Wood a corn miller, gave the following order to the plaintiff's agent. "Ordered of the house of John Fisher and Co., a small loading of wheat, say 750 or 800 quarters ..... Payment for the same to be drawn upon each of us in the usual manner." The plaintiffs in pursuance of this order purchased wheat, and wrote to Wood and Lupton as follows: "We have made a purchase for your joint account of 736 quarters fine red wheat." The plaintiffs drew bills on Lupton and Wood. The wheat turned out of bad quality and in consequence the bills were dishonoured but were renewed, the renewed bill on Lupton was duly paid, but Wood's was dishonoured and he became a bankrupt. The plaintiffs sued both defendants to recover that part of the price of the wheat which remained unpaid in consequence of Wood's failure to pay. Tindal C. J., "There is no question in the case as to any partnership, *inter se*, between the defendants; ... but the question is whether the wheat was sold to the defendants upon a joint contract; that is, whether upon the correspondence and other facts set out

[1] *Jones* v. *Smith*, 9 B & C., 532, cited in *Kendal* v. *Wood*, L. R 6 Ex., (254).

[2] Lindley, p. 53.

[3] *Reid* v. *Hollinshead*, 4 B. & C. 867.

[4] 9 Bing., 297.

in the case, the defendants gave the plaintiffs reason to understand and believe that they had the joint security of both defendants for the whole cargo, or whether the fair inference to be drawn by any reasonable men—and if so, the plaintiffs must be taken to have drawn such inference themselves—was not that each of the defendants contracted separately for his moiety of the joint cargo. And upon looking at the whole correspondence, and other circumstances of the case, the latter appear to us to be the proper conclusion." Judgment for the defendants. Thus again where the defendants Eyre and partners, Hatherley for himself and Stephens, and Pugh for himself and son agreed to purchase jointly as much oil as they could procure on the prospect that the price of oil would rise. Eyre and Co. being the ostensible purchasers through a broker, but the others were to share in his purchase at the price at which he bought, Hatherley and Co., and Pugh and Co. taking one half, and the defendants, Eyre and Co., the other moiety. Large quantities of oil were bought, Hatherley and Co. occasionally coming forward and giving directions as to its delivery, and making declarations that they were all jointly interested in the purchases. The price of oil fell; and Eyre and Co. having failed, the defendants contended that they were not liable, the contract having been made with Eyre and Co. only, and that the agreement which the defendants entered into between themselves was only a sub-contract and did not constitute a partnership. The Court held that the defendants were not jointly liable.[1] Such persons are not therefore joint principals.

Part-owners of ships.—A part-owner of a ship is a tenant in common.[2] The law relating to the position and liabilities of registered owners of ships is tolerably clear. Shipowners to begin with are not necessarily partners. An owner's liability or non-liability for necessaries supplied to a ship depends on the question whether the person who gave the order has his authority to give it.[3] But a part-owner, whether registered or not, has no power to bind the other owners without their assent. The question in each case is a question of fact, whether he has had such an authority committed to him, or if this is not in fact the case, whether he has been allowed to hold himself armed with such apparent authority.[4] And this right to appoint agents follows his liability.

Joint Creditors.—So it has been held that in respect of a bond given by C to A and B where accord and satisfaction by delivering of stock and goods by C to A was pleaded, that accord and satisfaction must be taken to be an answer

[1] *Coope* v. *Eyre*, 1 H. Bl., 37.

[2] *Green* v. *Briggs*, 6 Hare, 395.

[3] *Frazer* v *Cuthbertson*, L R. 6 Q. B., 93.

[4] *Frazer* v. *Cuthbertson*, L. R. 6 Q. B., (98), *Brodie* v. *Hastie*, 17 C. B., 109, *Chappell* v. *Bray*, 6 H. & N, 145 See as to the rights of Part-owners 1 Maclaghlan on Shipping, p. 100, *Keay* v. *Fenwick*, L. R. 1 C. P. D., 745.

to an action for a specialty debt; but that according to equity joint creditors must, *primâ facie*, be taken to be interested as tenants in common and not as joint tenants, and that the defence was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction, and that the defence was therefore defective and no answer to the action.[1]

Clubs and other Associations—As to the position of members of a committee of clubs and other Societies or Associations. Whether such members are jointly liable as principals upon contracts made or purporting to be made on their behalf in carrying on the work or enterprise which they undertake, and as such are joint principals it is not easy to lay down any single rule. Cases may arise in which it is sought to charge the entire membership as principals, in dealings by a smaller number purporting to be agents of all; and again cases may arise in which it is sought to charge the smaller number as the principals in the transaction. Such associations are, however, clearly not partnerships.[2] And therefore their members are not to be considered as partners; Lord Abinger as to this, says "I had thought but without much consideration at the assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them: that where there were a body of gentlemen forming a club, and meeting together for a common object, what one did in respect of the Society bound the others, if he had been requested and had consented to act for them ..... Trading Associations stand on a very different footing. Where several persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shown, to bind the partnership by a credit ..... It appears to me that this case must stand upon the ground which the defendant put it, as a case between principal and agent ..... I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an apparent necessity to accept, as in the purchase of a pipe of wine, the party might draw a bill, but I do not think he could accept the bill to bind the members of the Club. It is therefore a question here how far the committee, who are to conduct the affairs of this Club, as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the Club at large, and that depends on the constitution of the club, which is to be found in its own rules."[3]

In *Flemyng* v. *Hector*[3] when a club was formed subject to the rules that the entrance fee and subscription should be ten guineas and the annual subscription five guineas: that if the subscription were not paid within a certain definite

[1] *Steeds* v. *Steeds*, L. R. 22 Q. B. D., 537.

[2] *Todd* v. *Emly*, 7 M & W, 427. *Flemyng* v. *Hector*, 2 M. & W., 172.

[3] 2 M. & W., 172.

time, the defaulter should cease to be a member of the Club; that there should be a Committee to manage the affairs of the Club to be chosen at a general meeting; and that all members should discharge their own bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them. The Club was dissolved and the members called upon to pay a sum of eleven guineas each in discharge of its liabilities. The defendants among other members refused to pay their share, and the plaintiff sued them for work done and goods supplied for the use of the Club, held that the members of the Club, merely as such, were not liable for debts incurred by the Committee for work done or goods supplied for the use of the Club; for the Committee had no authority to pledge the personal credit of the members.

Apparent rule to be gathered from the cases—In such cases the rule of law appears to be that no one can be charged upon a contract, alleged to have been made on his responsibility, unless it can be shewn that he has given his express or implied assent to the making of such contract on his responsibility.[1] And this may be shewn by a course of dealing by which such persons have held themselves out as responsible as in the case of *Todd* v. *Emly*.[2] Where, however, there is anything in the bye-laws or rules of the Club or Association which authorizes a member or a Committee of members to pledge its credit, (and to such rules or bye-laws all persons joining the Club will of necessity be held to have assented to and bound by) the fact that persons are members of the Club or Associations will make them personally liable on contracts made, or purporting to be made, on behalf of the Club or Association, and entered into within the scope of the rules or bye-laws.[3] Where, however, there are no such rules, a member of a Club or Association will only be held liable upon it being proved that he assented either expressly or impliedly to the contract; and this may be gathered from the following cases of *Todd* v. *Emly*, *Wood* v. *Finch*, and *Steele* v. *Gourley*. *Todd* v. *Emly*[4] was an action against the defendants, two members of the Committee of the Alliance Club, tried at the Assizes to recover the price of wine furnished to them, it was proved that the wine was ordered by the house steward, who stated that he had authority to do so from the members of the Committee. It was not shewn that the defendants had either personally interfered in ordering the wine, or been present at any meeting of the Committee when the authority to order the wine was given; but merely that they were members of the general body of the Committee. The case was not left to the jury, counsel for the defendant submitting to a verdict for the defendants upon

[1] *Flemyng* v. *Hector*, 2 M. & W., 172.

[2] 8 M. & W., 505.

[3] *Todd* v *Emly*, 7 M & W, 427, *Cockerell* v *Aucompte*, 2 C. B N. S., 440

[4] 7 M. & W., 427.

leave being reserved to move for a new trial; at the hearing of the rule Lorp Abinger said:—"It does not appear upon the evidence that they (the Committee) were authorized by any member of the Club to deal on credit, but only to expend the funds which they had in their possession as trustees ..... If it were provided by the rules and orders of the Club, that the Committee conducting the affairs of the Club, should have authority to make contracts for the Club, then they might make contracts for each other; but in the absence of any evidence of that kind, what is it more than the case of gentlemen being named as trustees to manage a fund. The fund is placed in the banker's hands, and there it is to remain to answer the demands of the Club; but it does not appear that the Committee authorized each other to pledge each other's credit, or that the Club, as a body, authorized the Committee to pledge their credit. That is the principle laid down in *Flemyng* v *Hector* and appears to me to be applicable to the case, unless it can be shewn, that by the rules and orders of the Club the Committee were authorized to contract upon credit, or that in any other way the whole Club agreed that the Committee should make such contracts" The Court held that the plaintiff was not entitled to recover without proving either that the defendants were privy to the contract, or that the dealing on credit was in furtherance of the common object and purposes of the Club, and a rule absolute was made for a new trial. At the new trial,[1] the Court held that the question was not whether the defendants by their course of dealing, had held themselves out as personally liable to the plaintiffs, but whether they had individually authorized the making of the contract in the ordering of the wine.

Wood v. *Finch*[2] was a case where a Coal Club was formed by subscription, the coals being supplied to the members according to their respective subscriptions. The subscription, as paid, being paid to a Secretary who paid the money into the bank in the names of trustees. The Secretary ordered such coal as he thought to be necessary for the purposes of the Club, but it in no way appeared that he was authorized to pledge the credit of the Society; the plaintiff a coal dealer who had supplied coals on credit sued one of the trustees for money due to him; between the defendant and the plaintiff there had been before suit no communication whatever, held that he was not liable for the coals ordered on credit by the Secretary, there being no proof of any authority to pledge his credit.

In *Steele* v. *Gourley*[3] the action was brought by a butcher who had supplied meat to the Empire Club. The defendants were two members of the Committee of the Club, who had taken an active part in the management, by attending the meetings of the Committee, and taking part in authorizing the payments of the tradesmen's weekly bills. By the rules of the Club the property of the Club

[1] 8 M. & W., 505. [2] 2 F. & F. 447. [3] W. N., (Eng.) (1887), 147.

was vested in trustees. The plaintiff had for some time been paid monthly the amounts of his weekly accounts for the meat which he supplied, but ultimately the funds of the Club became deficient, and the bills were not paid. There was evidence that a book of the rules of the Club had been shown to the plaintiff, but he said he had not read them, though he had looked at the list of the names of the Committee. The Court held that there was evidence from which the jury might reasonably come to the conclusion that the defendants had authorized or acquiesced in the giving of the orders by the steward of the Club to the plaintiff on the ordinary terms as to payment. That being so, the defendants were liable, though the mere fact that they were members of the Club and members of the Committee would not have been enough to make them liable. That the plaintiff had given credit to the Club, and not to the defendants, but as it was settled by *Delauney* v. *Strickland*, 2 Stark 416, *Todd* v. *Emly*, 8 M. and W. 505, that when a tradesman supplied goods believing that the person who ordered them was authorized by A to do so, and it afterwards turned out that A had not given authority but B had, the tradesman was entitled to sue B as an undisclosed principal, those cases could not be overruled.

APPOINTMENT OF SUB-AGENTS.

Sub-agents.—A sub-agent is a person employed by and acting under the control of the original agent in the business of the agency.[1] He may be appointed to act where by the ordinary custom of trade, it is usual for a sub-agent to be appointed, or where from the nature of the agency itself, it is necessary that he should be employed;[2] where the sub-agent has been properly appointed, that is as last mentioned, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed,[3] the sub-agent being responsible for his acts to the agent, and not to the principal, except in cases of fraud or wilful wrong.[4] It is the agent who is responsible to the principal for the acts of the sub-agent;[5] as where the plaintiffs and defendants carried on business at the same place, and it was the custom that when a member of either firm was sent to Calcutta to make purchases, that the other firm took advantage of the opportunity to get the same person to purchase goods on their behalf; on one occasion a member of the defendants firm was sent to Calcutta

[1] Ind. Contr. Act, s. 191.

[2] *Ibid*, s. 190. *Quebec Ry. Co.* v. *Quin*, 12 Moo. P. C., 233.

[3] *Ibid*, s. 192.

[4] Ind. Contr. Act, s. 192. *Mainwaring* v. *Brandon*, 8 Taunt, 202. *Bear* v. *Stevenson*, 30 L. T., 177. *Jackson* v. *Clarke*, 1 Y. & J., 216. *Solly* v. *Rathbone*, 2 M. & S., 298.

[5] Ind. Contr. Act, s. 192. *Mathews* v. *Haydon*, 2 Esp., 509.

and the plaintiff's firm entrusted him with money to make certain purchases on their behalf: and through the negligence of that member of the defendant's firm the money so entrusted was lost. The plaintiff's firm then sued the members of the defendant's firm to recover the money so lost. Field J. held that section 194 of the Contract Act had no application, and that by cl. 2 of section 192 the defendant's firm were responsible to the plaintiffs for the acts of their sub-agent.[1] If, however, an agent without any authority from his principal either express or implied has appointed a person to act as sub-agent, the agent himself will stand towards such person in the relation of a principal to an agent, and will be responsible for his acts both to the principal and to third parties; but on the other hand the principal is not represented by or responsible for the acts of the person so employed[2] nor is the latter answerable to the principal.[3] A sub-agent therefore has not against the principal a lien for sums due on any goods which he holds between the principal and a third person from that third person,[4] he is moreover only accountable to his immediate employer[5] save as has been said in cases of fraud or wilful wrong. His authority is terminated by the termination of his immediate employer's (the agent's) authority, and the same rules which apply to the termination of the agent's authority apply equally to him.[6] But the sub-agent must be carefully distinguished from the "substitute" who is a person whom the agent is expressly or impliedly authorized by his principal to name for the purpose of acting for the principal in the business of the agency, such person is not a sub-agent but an agent of the principal, for such part of the business of the agency is entrusted to him.[7] The relation subsisting between such person and a principal is that of principal and agent, and the rules and principles governing that relationship are those by which the law of agency is governed. The distinction, therefore, between a sub-agent and a substitute is, that between the latter and the principal there is direct privity of contract;[8] whilst between the former and the principal there is so such privity;[9] save in cases of fraud or wilful wrong done by the sub-agent.[10]

Appointment of Substitutes.—The appointment of a "substitute" may be either express or implied; when it is express there is no difficulty; it may be

[1] *Sekunder Mondal* v. *Nocouri Biswas*, 11 C. L. R., 547.

[2] Ind. Contr. Act, s 193. *Mason* v. *Clifton*, 3 F. & F., 899.

[3] Ind. Contr. Act, s. 193. *Cobb* v. *Becke*, 6 Q. B., 930.

[4] *Snook* v. *Davidson*, 2 Camp., 218.

[5] See *Ireland* v. *Thompson*, 17 L. J. C. P., 248.

[6] Ind. Contr. Act, s. 210.

[7] Ind. Contr. Act, s. 194.

[8] Ind. Contr. Act, s. 194.

[9] Ind. Contr. Act, s 192. See the *New Zealand and Australian Land Co.* v. *Watson*, L. R. 7 Q. B. D., 374; *Cobb* v. *Becke*, 6 Q. B., 930. *Robbins* v. *Fennell*, 11 Q. B., 248.

[10] Ind. Contr. Act, s. 192. See *De Bussche* v. *Alt*, L. R. 8 Ch. D., 286.

implied when the ordinary custom of trade allows of such an appointment or where it is absolutely necessary that a substitute should be appointed.[1] And where the agent has either an express or implied authority to select a substitute, he will not be responsible to his principal for the acts of negligence of the substitute, if he (the agent) has exercised the same amount of discretion as a man of ordinary prudence would have exercised in his own case in making the selection.[2]

Joint-Agents.—The general rule in olden days, was in the case of a power being given to two or more persons to do an act, that the authority must be construed with strictness, and that execution of such power must, to be valid, be by all.[3] But in more modern times this strictness has been relaxed, and the Courts now will search the power to find the maker's intention Thus in *Guthrie* v. *Armstrong*[4] a power of attorney was given to 15 persons jointly or severally to execute such policies as they or any of them should jointly or severally think proper, Abbott C. J., holding that the execution by four was sufficient, said :— "Here a power is given to fifteen persons jointly and severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies, as all or any of them should think proper. The argument is that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct, if those had been different from the persons entrusted with the power." But even under the older authorities there appears to have been made a distinction between the execution of joint powers by private and public agencies; for we find that Lord Coke says:—"There is a diversity between authorities created by the party for private causes, and authority created by law for execution of justice."[5] Thus, where under statute which enabled the churchwardens and overseers with the consent of the major part of the parishioners to contract for the providing of the poor, it was held to be unnecessary that all the churchwardens and overseers should concur, the contract of the majority of them being sufficient.[6] And in *Grindley* v. *Barker*[7] Eyre C. J., said:—"I think it is now pretty well settled, that where a number of persons are entrusted with powers not of mere

Ind. Contr Act, 194 See *De Bussche* v *Alt*, per Thesiger, C. J., D. R. 8 Ch. D, (310) Ind. Contr. Act, s. 195.

[2] Co. Litt., 52, *b*. 181, *b* Viner's Abr. "Attorney," B., 7; 1, Roll's Abr, 329, Com Dig. "Attorney," C. 11; *Brown* v. *Andrew*, 18 L. 7 Q. B, 153; 13 Jur, 938, *Barron* v *Fitzgerald*, 6 Bing. N. C, 201.

[3] 5 B. & Ald, 628. *Godfrey* v. *Saunders*, 3 Wils, 73, 74, 94

[4] Co. Litt., 181, *b*. Com. Dig. "Attorney," C. 15

[5] The *King* v. *Beeston*, 3 T. R, 592.

[6] 1 B. & P. 234.

private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of Corporations go further: there it is not necessary that the whole number should meet; it is enough if notice be given, and a majority, or a lesser number, according as the charter be, may meet, and when they have met, they become just as competent to decide as if the whole had met." It may be therefore taken that where in private agencies a power is given to joint agents to act, the presumption is that it is conferred upon all from considerations of a personal nature, and with the object of making use of their combined experience and discretion; and that therefore such power can be only carried out by such agents jointly, unless indeed it appears from a proper construction of the power, that it is, or might be well intended that it should be, exercised otherwise, as in the cases of *Guthrie* v. *Armstrong*,[1] *Withnell* v. *Clerk*,[2] *Grindley* v. *Barker*.[3] On the other hand in the case of public agencies, or rather, agencies of a public nature, the rule appears to be that all the joint agents must meet to consult, but that the majority will conclude the minority, and their act will be the act of them all; and that in the case of Corporations it is not even necessary that the whole number should meet, it being enough if notice be given, and a majority or lesser number be present, and when they have met, those present may act for the whole number.

PART II.

DELEGATION OF THE AUTHORITY.

The authority is personal to the agent himself.—A principal usually appoints as his agent some person in whom he has confidence, and whom he supposes to have ability and fitness for the work to be performed. The work of the agency may even require skill and learning, and in nearly all cases judgment and care. There is every reason, therefore, for the principal being desirous that the work should be carried through by the person whom he has chosen for the purpose. And it is accordingly the duty of the agent personally to act in the business of the agency, unless indeed, as will be seen hereafter, the principal expresses his willingness that a substitute should be employed, or unless from necessity or usage of trade there is an implied authority for delegation.

General rule.—The general rule is, therefore, that the authority of the agent is personal to himself;[4] for as it is said by the old authorities "trust and

[1] 5 B. & Ald. 628.
[2] 6 T. R., 388.
[3] 1 B. & P., 229.
[4] Bells Comm. Bk. III, Pt I, Ch. 3. Rolls Abr. "Authority C."

confidence are reposed in him by the principal, and he cannot, except with the principal's knowledge, assign them to a stranger "[1] This doctrine is stated by Lord Chief Baron Comyns, in laying down in what cases there shall not be an attorney, as follows:—"So a man who acts only as an attorney or deputy to another cannot make an attorney to do it for him So a man who has but a bare authority or power, cannot act by attorney, an executor who has an authority to sell cannot sell by attorney; so he who has power to make leases cannot make them by attorney "[2] So again it is said in *Fitzherbert's case*[3] "a man cannot do homage or fealty by attorney for it is personal, the lord may beat his villein, and if it be without cause he cannot have a remedy, but the lord cannot authorize another to beat him without cause"

This general rule is enacted in the Indian Contract Act which lays down[4] that an agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade, a sub-agent may, or from the nature of the agency a sub-agent must be employed And this is the maxim of Common law "Delegata potestas non potest delegari" Illustrations of this well-established doctrine are numerous, thus where a person entrusted goods to a master of a ship for sale at the West Indies, and there being no market for the goods there, the master sent off the goods to another person at Caraccas for sale, and there they were destroyed by an earthquake, held that there being a special confidence reposed in the master he had no right to hand the goods over to another, and was therefore liable[5] In the same way it was held that a husband had no power to delegate a power given him under a settlement to dispose of a reversionary interest in an estate[6] Nor has an auctioneer, as a general rule, power to delegate his power to his clerk,[7] though perhaps he may employ the clerk to use the hammer and make the outcry, provided this be done under his own direction and supervision[8] Nor can a broker on becoming unable though want of funds to carry out the subject matter of the agency, delegate, secretly, and without the knowledge of his principal, the business to another on half terms as to commission[9] In *Cockran* v *Irlam*[9] Lord Ellenborough said "a principal employs a broker from the opinion he entertains of his personal skill and

[1] Bacon's Abr "Authority D" *Semaing* v *Thomlinson*, 6 Taunt, 147
[2] Com Dig "Attorney C. 8" 9 Co, 76 (*a*)
[3] 5 Co, 80
[4] Ind Contr Act, s 190
[5] *Catlin* v *Bell*, 4 Camp, 183.
[6] *Ingram* v *Ingram*, 2 Atk, 188
[7] *Coles* v *Trecothick*, 9 Ves., 251. See also *Tuson* v. *Barnwall*, 1 Y & J, 387
[8] Bateman on Auct, 156
[9] *Solly* v. *Rathbone*, 2 M & S. 298 *Cockran* v *Irlam*, 2 M. & S 301, (note).

integrity; and a broker has no right to turn his principal over to another of whom he knows nothing." Similarly when a person is employed to transport goods to a foreign market, he has no right to delegate the work to another.[1] So a notice to quit given by an agent of an agent is not sufficient without recognition by the principal.[2] Nor when the power of allotting shares is vested in the Directors of a Company by their deed of settlement, have they a right to delegate such a power.[3] Similarly in *Cartmell's case*,[4] when Directors of a Company, having under the articles of Association power to buy shares in the Company and to appoint a manager, appointed a manager who purchased shares on behalf of the Company, it was held that the Directors had no right to delegate to the manager the power to buy shares. On the same principle where an Act of Parliament provided that where any notice was to be given by the trustee, such notice should be in writing, or in print, signed by three or more of the trustees, or their clerk or clerks for the time being, by their order, it was held to be insufficient that the notice should be signed by some person whom the clerks to the trustees, in their character of attorneys, had in their service.[5]

Doctrine attempted to be applied to a legislative authority.—The doctrine of delegation has been attempted, by a Full Bench of the Calcutta High Court, to be applied to the action of the Government of India in passing an Act determining to remove certain districts out of the jurisdiction of the High Court and therein entrusting to the Lieutenant-Governor of Bengal the right to determine the date at which such removal should actually take place. By the 9th section of Act XXII of 1869 passed by the Governor-General of India in Council, the Lieutenant-Governor of Bengal was empowered from time to time, to extend *mutatis mutandis* to the Jaintia, Naga, and Khasia hills, the provisions contained in other sections of the Act, whereby the administration of civil and criminal justice within the district called the Garo hills was, from a date to be fixed by the Lieutenant-Governor, to be withdrawn from the jurisdiction of the Courts of civil and criminal jurisdiction constituted by the Regulations of the Bengal Code and the Acts of the Legislature of British India, and to be vested in such officers as the Lieutenant-Governor might appoint. It was argued before the Full Bench that the jurisdiction of the High Court as established by Parliament, could not be wholly abolished by any authority in this country whatsoever, and that if there was any authority to abolish the jurisdiction of the High Court, it was only the Governor-General in Council exercising legislative powers who could do so, and that the assumed abolition was not by his authority, but by the Lieutenant-Governor of Bengal acting under the powers given to him by Act XXII of 1869, which powers,

[1] *Schmaling* v. *Thomlinson*, 6 Taunt, 147.

[2] *Doe d. Rhodes* v *Robinson*, 3 Bing. N C, 677.

[3] *In re Leeds Banking Co.*, L R. 1 Ch., 561.

[4] L. R. 9 Ch, 691.

[5] *Miles* v. *Rough*, 3 Q. B., 846.

it was contended, were not validly confirmed. A majority of the Full Bench held that the Indian Legislature was to be regarded as an agent or delegate acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself; and that the provisions purporting to authorize the Lieutenant-Governor of Bengal to extend Act XXII of 1869 to the Jaintia Naga and Khasia Hills, since they involved a delegation of legislative power, were void and of no effect. This therefore was a direct application of the maxim referred to above. The application of that doctrine was not, however, upheld by their Lordships of the Privy Council, their Lordships said, "The ground of the decision of the majority of the Judges of the High Court was, that section nine was not legislation, but was a delegation of legislative power; in the leading judgment of Mr. Justice Markby the principles of the doctrine of agency are relied on, and the Indian Legislature seems to be regarded as, in effect, an agent or delegate acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself" ..... Their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian legislature, and indeed of the nature and principles of legislation; the Indian legislature has powers expressly limited by the Act of Parliament which created it, and it can of course do nothing beyond the limits which circumscribe those powers of the Imperial Parliament but when acting within these limits, it is not in any case an agent or delegate of the Imperial Parliament, but has, and was intended to have plenary powers of legislation as large and of the same nature as those of Parliament itself"[1]

No Delegation of a judicial authority.—There can be no delegation of a judicial authority. Thus in a suit on a promissory note in the Court of first instance the Subordinate Judge dismissed the suit; but on appeal the appellate Court remanded the case for the trial of certain issues; after the case had again come before the Subordinate Judge the parties applied that the matters in dispute might be referred to arbitration. This was done. Each of the parties appointing respectively an arbitrator and jointly an umpire; on the first sitting both arbitrators and the umpire were present; previously to the second sitting, one of the arbitrators withdrew; at the next sitting the remaining arbitrator and the umpire met, prepared and signed the award; objections were made to this award, but they were overruled by the Subordinate Judge. On appeal Oldfield and Mahmood JJ., held that the award was bad both on the ground that the Subordinate Judge had no power to refer the whole case to arbitration after passing judgment, and also that the absence of one arbitrator vitiated the award. Mahmood

[1] *Empress* v. *Burah Singh*, I L. R., 3 Calc., 62; on appeal, I. L. R., 4 Calc., 172.

J., as to this first point said—"When the Subordinate Judge had passed his decree, he had no power to interfere with it except by review, or in consequence of a direction of a Superior Court. And as soon as the appeal was filed in the Court of the District Judge that Judge only was competent to deal finally with the case. What I mean by "dealing finally" with it, is the power to say yes or no to the plaintiff's claim. Now an order passed by the District Judge, under s. 566 of the Civil Procedure Code, has not for its object the transmission of the appellate Court's jurisdiction—it's power to say yes or no to the plaintiff's claim—to the Court of first instance. It amounts to nothing more than a delegation to that Court of authority to take evidence upon certain issues which it is necessary to determine, ... The only tribunals which really have power to dispose of disputes are those which the State has established. Those tribunals can only delegate the powers conferred on them by the Legislature, and in so far as the Legislature expressly authorises them to do so. It is obvious that if a Court has jurisdiction to deal with a particular suit, it may delegate that power, but it cannot delegate a case which it cannot itself try. I think that the principle of the maxim "*delegatus delegari non potest*," applies here, and that the Subordinate Judge being, in this sense, himself a delegate in the case from the District Judge, could not himself delegate it to another tribunal, that his order of reference was therefore *ultra vires*, and that everything done in consequence of it was invalid."[1] So also where in an application for a certificate of administration in the Court of the District Judge of Kaladja, that judge delegated the examination of the witnesses to the Nazir of the Court, held that the order passed by the judge on the evidence returned by the Nazir was illegal.[2] So also an order on a somewhat similar application was set aside on, amongst other grounds, the ground that the assistant Judge, before whom the application was made, had referred the examination of witnesses to a Moonsiff.[3]

Nor can arbitrators delegate their powers.—Arbitrators, similarly, cannot delegate their powers; thus, where a reference was made to the arbitration of three persons for their award or the award of any two of them; after evidence on both sides had been gone into, it was agreed by two of them to make an award in favour of the plaintiff in the suit, subject to the decision of one of the three arbitrators, who was a barrister, on a point of law; and the latter without further reference to his fellow arbitrators, drew up the award, signed it, and sent it to them for their signatures. The Court set it aside on the ground that it was not legal, the parties being entitled to have the joint decision of at least two of the arbitrators upon every point submitted

[1] *Nand Ram* v. *Fakir Chand*, I L. R., 7 All., 520, (527) see also *Gossain Dowlut Geer* v. *Bissessur Geer*, 22 W. R., 207.

[2] *Lakshmibai Kom Sanshedappa* v. *Rudrappa*, 2 Bom. H. C., 405.

[3] *Ex-parte Manishankar Hargovan*, 2 Bom H. C., 404.

to them.[1] Parke B., (arguendo) pointed out the distinction between signing a warrant and an award, said, "in the case of an award the instrument is itself the judgment which surely ought to be completed when all the arbitrators are together; *non constat* that at the last moment one of them may not use arguments which may convince the others."[2] Similarly where certain matters arising out of a suit filed in the Moonsiff's Court of Sewan were referred by the Moonsiff to the decision of four arbitrators, two of whom, for some reason or another, were not present at the meeting convened for the purposes of arbitration, and the two arbitrators present, on their own authority, nominated two other persons who were not named in the order of reference to act for the absent members; of this alteration the parties interested in the litigation were unaware. The award was eventually prepared and signed by one arbitrator, and, in due course, made an order of Court; Morgan C. J. held that the arbitrators had no power to delegate their authority and he set aside the award.[3] A distinction, however, appears to be made between an arbitrator delegating his authority to another, and an arbitrator making use of the judgment of another on whom he can depend, and adopting that conclusion or advice and making it his own if he choses so to do.[4] As to this Mr. Russell in his work on Arbitration, p. 205, 2nd ed. says:—"although an arbitrator may not delegate his authority "the cases are numerous to show that an arbitrator may submit a material question affecting the merits of the case to another and, after hearing his opinion, adopt it as his own, upon the credit which he gives to the judgment and skill of the person to whom he refers."

Delegation to Ameens—A Civil Court is not warranted in deputing its functions to an Ameen.[5] Phear J., in a case[6] where this was done, said, "This Court has very many times, in reference to proceedings of this kind (deputing the decision of a case to an Ameen) expressed its opinion that s. 180 of the Civil Procedure Code (1859), does not warrant a Civil Court in deputing its functions to an Ameen, whom it sends to the locality for the purpose of making a local investigation. All that it can charge the Ameen with, is, to obtain such

[1] *Little* v. *Newton*, 2 Scott. N. R., 509.

[2] *Ibid*, p. 469. See also on this subject *Whitmore* v. *Smith*, 7 H. & N. per Blackburn, J., 513. *Lingwood* v. *Eade*, 2 Atk., 501. *Proctor* v. *Williams*, 8 C B. N. S, 386.

[3] *Surubjeet Narain Singh* v. *Gouree Pershad Narain Singh*, 7 W. R., 269.

[4] *Anderson* v. *Wallace* 3 Cl. & F. 26. *Emery* v. *Wace*, 5 Ves, 846. *Whitmore* v. *Smith*, 7 H. & N., 509.

[5] *Ram Dhun Dey* v. *Ram Monee Dey*, 21 W. R. 280.

[6] *Iswarchundra Das* v. *Jugal Kishore Chuckrabutty*, 4 B. L. R. Ap., 33. See also *Chunder Sircar Chowdhry* v. *Nobinchunder Biswas*, 17 W. R. 282. *Shadhoo Singh* v. *Ramanoograha Lall*, 9 W. R 83 *Raghunath Shaw* v. *Rajkrishna Deb*, 1 B. L. R. S. N., 2 *Burodachurn Bose* v. *Ajodhya Ram Khan*, 23 W. R., 286.

information with regard to the physical features of the place in dispute, the identification of land, depicted in maps, with the parcels which are the subject of the suit, the identification of maps with one another by the aid of objects to be found on the land, and other matters of this kind, which may be of use in, and auxiliary to, the proper trial of the suit by the Court before which it is pending." Similarly, in England it has been held that the sheriff under the writ of Trial Act has no power to delegate his power to an arbitrator.[1]

Delegation of powers of a Karnavan.—A Karnavanship of a Malabar tarwad as recognized in Malabar is a birthright inherent in the status of the senior male member of a tarwad, and is a personal right, and as such it cannot be delegated to a stranger. Where therefore a Karnavar under a document styled as a muktiarnamah, authorized his son to manage in the Karnavar's name all the affairs of his tarwad, and gave him full powers relating to such tarwad; held, that if the document was an assignment of the right of Karnavanship, it was void, though for a time only, on the ground that the delegate was not a member of the tarwad; if on the other hand it was a power of attorney limited to management of specific property as an agent subject to the general control of the Karnavan it might be valid on the ground that the Karnavanship was not the interest assigned or delegated; but as the document did not purport to limit the agency to special matters, or to the management of property only, but purported to put the delegate in the Karnavan's place in regard to all the affairs of the tarwad, and the apparent intention was to impose upon the tarwad the management and authority of the Karnavan's son, no effect could be given to it without contravening the special usage of the district.[2]

Distinction between delegation of judicial and ministerial acts.—There, however, is a distinction drawn between the delegation of judicial and ministerial acts.[3] The general rule, does not require that the agent shall perform in person merely mechanical or ministerial parts of the work of the agency, for the performance of such duties may well be left to others, and will not affect the rule; for, as says Sir John Romilly. "It is undoubtedly true, that an agent cannot delegate his authority to another; but I apprehend it to be equally clear, that an agent is entitled to perform, and must necessarily perform, a great number of his acts and functions through the aid of persons to whom he delegates his authority. Thus for instance when a merchant receives goods from abroad for sale, and he deputes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly; in that case, it would be impossible for the consignor to say, that the sale was void, because the merchant

[1] *Wilson* v. *Thorpe*, 6 M. & W., 721.

[2] *Chappan Nayar* v. *Assen Kutti*, I. L. R 12 Mad., 219.

[3] *Baker* v *Cave*, 1 H. & N, 674 (678). *Battye* v. *Gresley*, 8 East., 318. The *King* v. *Forest*, 3 T. R., 38 (40). And cases collected in May on Insur. para. 154.

did not personally sell them himself, but employed another person for that purpose, by whom the sale was effected. The merchant would no doubt be answerable for all the acts of his foreman, but provided the acts done were proper and within the scope of his authority, they would be the acts of the merchant himself."[1]

Application of the maxim delegatus non potest delegari.—But although as a general rule the maxim "*delegatus non potest delegari*" applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person, yet this maxim when analyzed merely imports that an agent cannot without authority from his principal devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do, from time to time, render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed; so as to enable the agent to appoint a delegate.[2] The general rule is further relaxed in the following cases:—

1. Where the agent has express authority to employ a sub-agent; or where authority to delegate is given by enactment of law.

2. Where by the ordinary custom of trade a sub-agent may be employed.[3]

3. Where from the nature of the business of the agency, a sub-agent must be employed.[4]

The first of these exceptions requires no comment, save that of setting out the different Acts under which delegation may be made, and these will be found at the end of the chapter on this subject. Before, however, giving examples of the second exception, *viz.*, when by the ordinary custom of trade a sub-agent may be employed; I purpose to give some explanation of the term "custom of trade."

Custom of trade.—The term "custom of trade" needs perhaps some few observations—It is not a "custom" in the technical sense of the word;[5] that is to say, it is not a custom forming part of the law of the realm as do general, particular, and personal customs, which latter is more commonly known as the "custom of merchants." But it is a custom merely modifying a contract entered into by private persons. Customs which modify contracts entered into between

[1] *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav., 377.

[2] *De Bussche* v. *Alt*, L. R. 8 Ch. D., 287, (310).

[3] Ind. Contr. Act, s. 190.

[4] Ind. Contr. Act, s. 190.

[5] *See Robinson* v. *Mollett*, L. R 7 H. L. per Cleasby, J, 826.

private persons are those which have prevailed so long and so uniformly in transactions between persons engaged in a particular occupation, that when two of such persons enter into a contract relating to their occupation, and not containing anything inconsistent with the custom, they are presumed to have contracted with reference to it, and it then forms part of the contract so far as it is applicable. Such customs are of two kinds, customs of usage of trade, and customs relating to agriculture and the tenure of lands for agricultural purposes prevailing within a certain district. It will only be necessary to refer to the first of these—Customs or usages of trade are customs prevailing in a particular trade or business.[1] Such customs or usages may not only annex terms to a contract which is not inconsistent with them, but may also control the interpretation of a contract which is complete in itself but which contains terms used in a technical sense.[2]

Evidence as to customs of trade.—And in order to constitute such a usage or custom as will be admissible in evidence, to explain the terms of a written instrument, it is not necessary that it should have been immemorial, or even established for a considerable period, or uniform or notorious as "custom" (in its technical sense), or capable of being defined with precision and accuracy. The usage or custom may be still in course of growth, it may require evidence for its support in each case, but in the result it is enough, if it appears to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.[3] It should also be remembered that it is the fact of a general custom or usage prevailing in the particular trade or business, and not the mere judgment and opinion of the witnesses, which is admissible in evidence;[4] and unless the witnesses can state instances of the usage or custom having occurred within their own knowledge, their testimony is seldom entitled to weight.[5] And as a defence to such a custom when set up, may be pleaded, non-existence of the custom, its illegality or unreasonableness, or that it formed no part of the agreement between the parties.[6]

The habit of admitting evidence of custom or usage to explain a written contract, although upheld, has been by learned Judges considered both as unwise and unjust,[7] and there will be found in Mr. Pitt Taylor's work

[1] *Goodwin* v. *Robarts*, 10 Ex., 76, 337.

[2] Sweet's Law Lex. tit. "custom."

[3] *Juggomohun Ghose* v. *Manick Chund*, 4 W. R., 8, 10.

[4] See *Cunningham* v. *Funblanque*, 6 C. & P., 44.

[5] Taylor on Evid., para 1077. *Lewis* v. *Marshall*, 7 M. & Gr., 744, 745, per Tindal C. J.

[6] *Bourne* v. *Gatcliffe*, 3 M. & Gr., 684, per Alderson, B. *Bottomley* v. *Forbes*, 5 Bing. N. C., 127, 128, per Tindal C. J. *Fawkes* v. *Lambe*, 31 L. J. Q B., 98.

[7] *Johnston* v. *Usborne*, 11 A. & E., 557, *Trueman* v. *Loder*, 11 A. & E., 597.

on Evidence, p. 1013 (8th ed.) set out at length a judgment of Mr. Justice Story reported in 2 Summ. 567, which points out the harm which is done by the indiscriminate habit of setting up usages and customs in almost every kind of trade to control written contracts, and the danger atttendant on the admission of evidence therefor; His Lordship there says "the true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the words have various senses, some common, some qualified and some technical according to the subject matter to which they are applied.

How far custom may control a contract.—On the subject of what is the proper measure or limit of the control of mercantile customs by the Law, Mr. Justice Brett in *Robinson* v. *Mollett*,[1] "that the course of mercantile business should be left to be as free as possible, seems to me beyond doubt, that it is to be subject to some control is equally undoubted. It is when merchants dispute about their own rules that they invoke the law. The Courts therefore being appealed to, have been obliged to apply some rule. When merchants have disputed as to what the governing rule should be, the Courts have applied to the mercantile business brought before them what have been called legal principles, which have almost always been the fundamental ethical rules of right and wrong. They have decided in favour of that course of business which was in accordance with such principles or rules, and against that course which was inconsistent with them. Thus, for example, when ship-owners and underwriters disputed upon the effect of concealment of certain facts, the Courts, finding that the contract of maritime insurance must be one of confidence, because the knowledge of many material facts must of necessity be confined to the shipowner, applied the principle of "*uberrima fides*," and laid down the rule that if a material fact known to the assured and unknown to the underwriter be not communicated to the latter at the time of making of the contract it shall be ineffective. But when once rules are laid down, they must at some time become irksome to some individual or to some body of men. And there must from time to time be some contention raised, or some course of business invented, which is alleged to be an attempt to break through them. The Courts are then again appealed to. Customs of trade, as distinguished from other customs, are generally courses of business invented or relied upon in order to modify or evade some application, which has been laid down by the Courts, of some rule of law to business, and which application has seemed irk-

[1] 6 L. R. 7 H. L. (817).

some to some merchants. And when some such course of business is proved to exist in fact, and the binding effect of it is disputed, the question of law seems to be, whether it is in accordance with fundamental principles of right and wrong. A mercantile custom is hardly ever invoked but when one of the parties to the dispute has not, in fact, had his attention called to the course of business to be enforced by it; for if his attention had in fact been called to such course of business, his contract would be specifically made in accordance with it, and no proof of it as a custom would be necessary. A stranger to a locality, or trade, or market, is not held to be bound by the custom of such locality, trade, or market because he knows the custom, but because he has elected to enter into transactions in a locality, trade, or market wherein all who are not strangers do know and act upon such custom. When considerable numbers of men of business carry on one side of a particular business, they are apt to set up a custom which acts very much in favour of their side of the business. So long as they do not infringe some fundamental principle of right and wrong, they may establish such a custom; but if, on dispute before a legal forum, it is found that they are endeavouring to enforce some rule of conduct which is so entirely in favour of their side that it is fundamentally unjust to the other side, the Courts have always determined that such a custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law, and void. ..... If the custom, which exists in fact is not unjust, as against principals ignorant of it, your Lordships will uphold it, however much it departs from the rules hitherto recognized by the Courts as applicable to the contract of employment between principals and brokers, but if it so far breaks from those rules as to be unjust to such principals in such contract, your Lordships will pronounce it to be a void as a custom. One form of stating this proposition of injustice is to say, as Willes J., said in the Court of Common Pleas in this case, 'It is an elementary proposition that a custom of trade may control the mode of performance of a contract, but cannot change its intrinsic character.' This is true, I apprehend, because it would be manifestly unjust to allow one party to a contract to change, without the consent of the other, the very substance of the contract, or any essential part of it, to which they had actually specifically agreed. And thus Blackburn J., in the Exchequer Chamber says, in what I venture to think are equivalent terms. 'To some extent I agree with this—that is, with the proposition enunciated by Willes J., if the terms are such as to be inconsistent with the nature of the employment, so that if they prevailed they world change its nature altogether, I think they should be rejected.' The question therefore may be thus stated;—Is the custom relied on so inconsistent with the nature of the contract to which it is sought to be applied as that it would change its nature altogether, or as to change its intrinsic character If it would, it is unjust and therefore void. if it would not,

it should be allowed to prevail." Having refered to the term "custom of trade," we will now return to the second exception to the general rule, *viz.*, that a sub-agent may be appointed where by the ordinary custom of trade a sub-agent may be employed.

Illustrations of the 2nd exception, whereby the ordinary custom of trade a sub-agent may be employed —As where certain guardians of a Union employed one Kempthorne to prepare a specification for a workhouse, and Kempthorne employed one Moon an architect to make calculations, the Court decided that Moon, having proved that Kempthorne in employing him had acted in accordance with the custom of his trade of an architect, might sue the guardians for compensation[1] So a master of a ship has power by custom of trade, when seeking freight to employ freight-brokers for that purpose.[2] But where a certain firm (Campbell and Orr) consigned goods to one McComley upon a *del credere* commission for sale, and drew bills on him in advance, which McComley accepted, but never paid, and afterwards without the knowledge of Campbell and Orr placed the goods with Hutchinson, another broker, upon a *del credere* commission, and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, Lord Ellenborough said, "there certainly was not any express privity between Campbell and Orr and Hutchinson, neither can any be implied unless the case had found that *the usage of trade* was such as to authorize one broker to put the goods of his employer into the hands of a sub-broker to sell and to divide the commission with"[3] But where a print-seller entrusted a mate of an East Indiaman with certain goods to be disposed of by him in India, agreeing to take back from the mate whatever he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get if he could not obtain that price; and the mate not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England, it was held that the delivery to the agent was within the terms of his agreement[4]

Instances of the 3rd exception Where, from the nature of the agency, a sub-agent must be employed.—There are many cases which, from the nature of the duty, or from the circumstances under which it is to be performed, make it imperatively necessary that a sub-agent should be made use of. Thus, an agent employed to collect a debt by suit would be entitled to employ an attorney; or to sell goods by public auction, it would be necessary to employ an auctioneer; or where the power given by one party to another by an instru-

[1] *Moon* v. *Guardians Whitney Union*, 3 Bing N C., 817

[2] Story on Ag, 14.

[3] *Cochran* v. *Irlam*, 2 M. & S, 301, (308) *note*.

[4] *Bromley* v. *Coxwell*, 2 B. & P., 438.

ment in writing is of such a nature as to require its execution by a deputy, the party originally authorized as the agent may appoint a deputy. This was so decided by the Privy Council on appeal from Lower Canada in the case of the *Quebec and Richmond Ry. Co.* v. *Quinn*[1] there, by an Act of the Canadian Legislature, 13 and 14 Vic., c. 116, a Company was incorporated for the purpose of making a railway, either by agreeing with the owners of the land for the price of and compensation to be given, or if the matter could not be settled, by referring to arbitration. A contract was afterwards entered into between contractors for completion of the railroad, by this contract it was agreed that the contractors were to complete the railroad at their own expense, and pay any claim which might be made against the Company, including the purchase of lands required, and the Company were to exercise or permit the contractors to exercise, as the case might be, any of the powers vested in them by the Act of Incorporation as fully as if the Company itself had exercised such powers and performed the works; and in the exercise of such powers the contractors were to use the name of the Company, if deemed necessary. The contractors who resided in England, afterwards by a power of attorney which recited the above contract, deputed one Reekie as their agent, with full power on their behalf to construct the railroad, and to enter into contracts for the purchase of land, and to settle any claim for land or other damages. The Company required part of some lands belonging to one Quinn, and, previously to the contract for the completion of the railroad, had been in treaty with him for the taking such land, but could not agree upon the terms. Quinn had, in consideration of the Company's compulsory powers of purchase under the Act, put them in possession. Subsequently Reekie and Quinn referred to arbitration the compensation to be given for these lands. A certain sum was awarded and Quinn applied to the Company for payment, who referred him to the contractors, who refused payment. On a suit by Quinn against the Company, the Company pleaded that the contractors were alone liable, that Reekie had no authority either from them or the contractors to refer the matter to arbitration. Their Lordships of the Privy Council found that the contractors under the contract had power to delegate to an agent powers similar to those vested in them by the Company, and that under the power of attorney executed by the contractors Reekie possessed the same powers of acting and rendering the Company liable, as the contractors themselves had under the contract.

Similarly a Corporation must act by agent, for being an artificial body, it cannot act on its own behalf.[2] And again where a layman has authority from his principal to manage a suit on his principal's behalf, he would be at liberty to delegate his authority to an attorney as from the nature of the business

[1] 12 Moo. P. C., 232.

[2] Co. Litt., 66, *b*.

constituting the agency, the business could only be done through a sub-agent who is an attorney.[1]

In connection with the foregoing exception reference should be made to cases where an agent holds an express or implied authority to name another to act for the principal in the business of the agency; for in those cases such a substitution is not in truth a delegation at all, inasmuch as the person named and appointed to act by the agent in the business is in reality an agent of the principal, and not a sub-agent; the relation existing between him and the principal creating direct privity of contract between them.

Delegation by Trustees, whether under the Indian Trusts Act, or not.—The office of trustee is one of personal confidence and ought so far as possible to be performed by the person appointed to that post. But it has been always perfectly legal and in fact customary for a power to be inserted in the trust deed enabling the trustee or trustees to appoint some other persons to perform certain acts for them.[2] Amongst such acts as may be delegated are those entailing mere formalities; and it has been further held that where the delegation of any of the trustees' duties arises from moral necessity or where the delegation is conformable to the common usage of mankind, delegation may be made.[3]

The Indian Trust Act of 1882 which at present is only applicable to the Madras Presidency, the North-Western Provinces, the Punjaub, Oudh, the Central Provinces, Coorg and Assam; and does not affect the rules of Mahomedan law as to waqf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or apply to public or private, religious or charitable endowments, or to trusts to tribute prizes taken in war among the captors, and saves trusts from the Act which were created before the 1st of March 1882, lays down that a trustee cannot delegate his office or any of his duties either to a co-trustee or a stranger unless (*a*) the instrument of trust so provides or (*b*) the delegation is in the regular course of business, or (*c*) the delegation is necessary or (*d*) the beneficiary being competent to contract, consents to the delegation; and the Act declares further that the appointment of an attorney or proxy to do an act merely ministerial and involving no independent discretion is not a delegation within the meaning of the section.[4]

The Act therefore merely enacts the law as administered in England on the subject as far as is stated above. But the case of *Speight* v. *Gaunt*[5] has,

[1] See Bells Comm., Bk. III, Pt. I, Ch. iii, 4.

[2] *Titley* v. *Wolstenholme*, 7 Beav, 424

[3] *Ex-parte Belchier*, 1 Amb., 218, *Attorney General*, v *Scott*, 1 Vos. Sen 418, *Ex-parte Rigby*, 19 Ves, 463

[4] Ind. Trust. Act of 1882, s. 47.

[5] L. R. 9 App. Cas., 1.

however, further broken in upon the maxim *delegatus non potest delegari*, by laying down that a trustee is justified in employing brokers to invest the trust funds, if he follows the usual and regular course of business adopted by an ordinary prudent man in making an investment; this is possibly a slight enlargement of the powers given under the Indian Trusts Act, and this case would, in all probability be followed in this country in cases which do not fall under the Act. In England a trustee's powers has been enlarged under certain statutes,[1] which, however, are not applicable to this country.

Cases in which delegation may, or may not, be presumed.—Notwithstanding the fact that by Hindu Law, no one but the father while he is alive, can give his daughter in marriage, yet it has been presumed that the father delegated his authority to another from the fact that the father having given his daughter, when an infant, to another. and had left her with him till the proper time when a husband ought to have been provided for her, and then allowed the plaintiff to marry her, and had taken no steps to impeach the validity of the marriage for the space of four years.[2] But if will not be assumed that directors of a Company have either expressly or impliedly delegated to their agent in India a power to enter into contracts which they could have done themselves without his intervention, and with advantages which he in India would not possess, the execution of which they might have superintended, and the performance of which they might have watched and enforced.[3]

Delegation under Statute—Under the Indian Insolvent Act.—Under the Insolvent Act 11 and 12 Vic., c. 21, s. 28, the assignee or assignees have power under certain conditions with the consent of the creditors to submit disputes to arbitration.

Under the Succession Act, and Probate and Administration Act.—Under Section 212 of Act X of 1865, and section 28 of the Probate and Administration Act, Act V of 1881, a Court may, where an executor is absent from the province in which an application is made, and there is no executor within the province willing to act, grant letters of administration with the will annexed to the attorney of the absent executor for the use and benefit of his principal.[4]

Under Act XXXII of 1867, s. 1.—Under the Chief Commissioner's Powers Act of 1867, the Governor-General in Council is empowered to delegate to the Chief Commissioners of Oudh, the Central Provinces and British Burmah all or any of the powers, theretofore or thereafter conferred by

[1] 44 & 45 Vic. c. 41, s. 56, and the Trustees Act of 1888, s. 4.

[2] *Golamee Gopee Ghose* v. *Juggessur Ghose*, 3 W. R. 193.

[3] *Stewart* v. *Scinde Punjab and Delhi Ry. Co.*, 2 B. L. R., (214).

[4] See cases noted in Henderson on Intest and Test Succ., p. 231.

any Act of the Governor-General in Council on the Governor-General of Council, as the Local Government of the territories under the administration of such Chief Commissioners; and all acts done by the Chief Commissioner to whom such power has been delegated shall be as valid as if they had been done by the Governor-General in Council.

Under Reg. I of 1877, s. 10.—Under the Ajmeer Courts Regulation 1877, the Chief Commissioner may delegate to a Subordinate Judge of the first class, powers conferred on a principal Civil Court of Original jurisdiction.

Act XVII of 1877, ss. 19, 48.—Under the Punjab Courts Act of 1877, s. 19 the Chief Court may delegate to any one or more of the Judges of the Court any powers conferred on it under that Act. And under s. 48 of the same Act the Local Government may, with the sanction of the Governor-General in Council, appoint a single Judge of the Chief Court to exercise the powers of superintendence conferred on such Court by s. 25.

Act XV of 1880, ss. 39, 40, 58.—Under the N.-W. P. and Oudh Municipalities Act a Municipal Board may delegate to one or more of its members the power of entering into contracts under 200 Rs. and of executing the same. And the Board may, at a special meeting, delegate to one or more of its Committees of its members any of the powers vested in the Board under ss. 56 and 57.

Under Act VII of 1880.—Under the Merchant Shipping Act of 1880, s. 53 the Local Government may delegate to the Port Commissioners all the functions of a Local Government save the powers given by ss. 14 and 15 of the Act.

Under the District Delegates Act, VI of 1881.—Under this Act power is given to the High Court to appoint certain judicial officers to act for District Judges as delegates to grant probate and letters of administration in non-contentious cases.

Under Act IV of 1882, Transfer of office.—Under s. 6 of Act IV of 1882, Transfer of Property Act, neither a public office, nor the salary of the officer can be transferred.

Under the Companies Act.—Section 179 of Act VI of 1882, the Indian Companies Act empowers a Company which is about to be wound up voluntarily by an extraordinary resolution, to delegate to its creditors, or to any Committee of its creditors, the power of appointing liquidators or any of them, and supplying any vacancies in the appointment of liquidators; acts done in pursuance of such delegated power having the same effect as if done by the Company. The directors of a Company have likewise authority to delegate any of their powers to Committees consisting of such member or members of their body as they think fit; any Committee so formed must, however, in the

exercise of the powers so delegated,[1] conform to any regulations that may be imposed on it by the directors.[2] With reference to this power it has been held that one director if appointed by the Board with all the powers of the Board, validly constitutes a Committee.[3]

By Liquidators under the Companies Act.—A case[4] raising questions under ss. 18 and 95 of the English Companies Act of 1862, (which sections are similar to sections 177 and 144 respectively of Act VI of 1882 of the Governor-General of India in Council), as to the powers of liquidators to delegate their powers to others, came before Sir W. Page Wood in 1888. There, four liquidators of a Company passed a resolution that one of them should have power to accept bills of exchange, and they subsequently resolved that certain bills to the amount of £7500, which had been accepted to the credit of a certain firm, should be renewed; fresh bills were accordingly drawn and accepted by one liquidator, Sir W. Page Wood said "I am not at all inclined to dispute the proposition (laid down by Counsel), that the authority of two does not necessarily mean that you should find the names of the two liquidators on the piece of paper which forms the bill. But though the liquidators might well meet (the four liquidators are said to have done so) and give authority to some one, yet that must be as to the acceptance of a specific bill, or other specific thing which is to be done; and they may then say that their clerk or agent, whoever it may be, shall sign for them. That may be a good acceptance under s. 95, but at least you must have the judgment of the two liquidators upon the particular bill which they authorize to be so signed. The grant of a sweeping authority to issue bills to the extent £16,500 without any judgment exercised as to the date on which they are to be issued, the proportions in which they are to be issued, the amounts of the bills ..... does not appear to us to be an act which it was competent to the four liquidators to do in the manner proposed by their resolution," and the learned Judge held that the acceptances were invalid. The case came up on appeal[5] and their Lordships affirmed the judgment of the Court below; The case is, however, only an authority for the proposition that liquidators are unable to delegate their *discretion*, but that if they determine that certain specific bills should be accepted, they might delegate to one of their number the power of actually signing his name for them; but it is left a matter of doubt whether under any circumstances liquidators can authorize one of their number to sign a bill in their name.

[1] *Totterdell* v *Fareham Blue Brick, Co*, L R 1 C. P. 671

[2] *In re Taurine Co.*, L. R. 25 Ch. D., 511.

[3] Ind Cotr. Act Table A., 68, (3). *In re Taurine Co*, L. R. 25, Ch D, 511.

[4] *In re Birmingham Banking Co.*, L. R. 3 Ch. 651.

[5] L R. 6 Ch., 206.

A transaction involving a general delegation of statutory powers by one Company to another is not within the powers of a Company.[1] As to a delegation of a statutory power by an agent to his sub-agent see *Quebec and Richmond Ry. Co.* v. *Quinn*.[2]

Under Act X of 1882.—Under the Criminal Procedure Code of 1882, ss. 13, 14, the Local Government may delegate to a District Magistrate its powers of placing any Magistrate of the first or second class in charge of a sub-division. And with the previous sanction of the Governor-General in Council the Local Government may delegate to any officer under its control the powers conferred on Special Magistrates.

Under Act XV of 1882.—Under s. 33 of the Presidency Town Small Cause Courts Act that Court has power to delegate non-judicial duties to its Registrar.

Act XIII of 1884.—Under the Punjab Municipality Act, s. 33, the Committee of a first class Municipality may, subject to the provisions of that Act, delegate to one or more of its members the power of entering into any particular contract under the value of Rs. 500.

[1] See *Beman* v *Rufford*, 1 Sim N. S., 550, and *Midland Ry. Co.* v. *G Western Ry. Co.*, L. R 8 Ch., 841.

[2] 12 Moo. P. C., 233

LECTURE III.

RATIFICATION.

Where there may be ratification—Meaning of ratification—It is express or implied—Instances of express ratification—Evidence of ratification or implied ratification—By acquiescence—Different meanings of acquiescence—Instances of implied ratification—Qualified acquiescence is not sufficient—By silence—Ratification by long inaction—By minor on attaining full age—Standing by—Implied ratification by Judge—Essentials of ratification—Act must be done for or on account of person electing to ratify—Extension of principle in insurance cases—Must be by a person in existence at the time the act is done—Distinction between decisions of Common Law Courts and Courts of Equity—Act of agent ratified by administrator—No ratification of illegal and void acts—Not applicable to criminal cases—Distinction between ratification of void and voidable acts—Full knowledge of material facts necessary—No ratification of part of a transaction—Effect of ratification—Of unauthorized acts of directors—Evidence of ratification by shareholders—Acquiescence by directors—Instances—Ratification of particular acts done by directors in excess of their general authority—Ratification of alteration of articles of Association.

Where there may be ratification—Where acts are done by one person on behalf of another but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been previously performed by his authority.[1] The power to ratify an act done on behalf of another, therefore, implies or presupposes in that other the power to do that act himself. It may be that the person who has taken upon himself to represent that other is in reality the agent of that other, but has exceeded the authority given him; but on the other hand, he may have no connection at all with the person he has assumed to represent.

Meaning of ratification—What is meant by ratification is the adoption and confirmation by one person of an act done by another who has assumed to act for the former, after full knowledge of that which was done on his behalf.

It may be express or implied.—Such ratification may be, as will be seen hereafter, express, that is to say, it may be confirmed by writing or by word of mouth, or it may be implied from the conduct or action of the person for whom the act was done'[2], and that in a variety of ways. This doctrine is stated by Tindal C. J., in *Wilson* v. *Tumman*[3] as follows:—"That an act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if

[1] Ind. Contr. Act, s. 196. [2] Ind. Contr. Act, s. 196. [3] 6 M & G., 236.

subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by and with all the consequences which follow from the same act done by his previous authority." The case last cited is one of the leading cases in England on the subject of ratification, and, as will be presently seen, has been expressly followed in this country. That the doctrine of ratification was in force in this country previously to the Contract Act, may be seen from the case of the *Secretary of State for India in Council* v *Kamachee Boyee*[1] which was a case brought by the widow of the Rajah of Tanjore for a declaration that she was entitled to inherit as heiress of the late Rajah; and in which the Privy Council held that the Government had ratified and adopted the acts of its agent, the Collector, in seizing the property of the Rajah.

Instances of express ratification —With reference to express ratification, it is unnecessary to do more than to give a few instances of such ratification, and to generally refer to the numerous cases which there are upon the subject. The most marked case which can be chosen for an example is, I think, that of *Ancona* v. *Marks*[2] there it appeared that the defendant a tradesman had delivered and endorsed to one Wright, an attorney and money-lender, certain promissory notes and bills of exchange, upon his discounting them for the defendant. Wright stated in his evidence that he came to London and saw one Tucker a member of the firm of Greville and Tucker, attornies in London, who had occasionally acted as his agents. He had with him the promissory notes and bills before referred to, and he asked Tucker to find a client who would lend his name in an action upon them. Tucker said there was no difficulty as he had the authority of Ancona (the plaintiff). Wright then said "I wish you to receive these bills for Ancona and to bring an action upon them in his name;" and Wright then endorsed and delivered them to Tucker. On a previous occasion Wright had a bill of the defendant's, and asked Tucker if he could find a client who would allow his name to be used in an action upon it, when Tucker mentioned, Ancona, the plaintiff, and the action was brought in his name, and the money recovered Tucker informed Ancona that the action had been brought in his name, and he adopted it, and stated that Greville and Tucker had used his name before. He had, however, no knowledge that his name was used in this action, until after it was brought, but when told of it he was willing that it should go on The Court held that the plaintiff's ratification of the acts of Greville and Tucker, was tantamount to a previous command, and made the acts done by them as his agents the same as if he had done them himself.

So where A entered into a contract for the sale of a quantity of oil without

[1] 7 Moo. I. A., 476. [2] 7 H. & N., 686.

the authority or knowledge of B, and B on receiving information of the circumstance, refused to be bound, but afterwards, assented by parol, and samples of the oil were accordingly delivered to the vendees, it was held that B's ratification of the contract rendered it binding upon him.[1]

Instances of express ratification.—Further instances may be found in the cases of *Fitzmaurice* v *Bayley*,[2] *Benham* v. *Batty*,[3] *Wilson* v. *Tunman*,[4] *Seth Samur Mull* v. *Choga Lall*,[5] *Pestonjee Nesserwanjee* v. *Gool Mahomed Sahib*,[6] *Jones* v. *Bright*,[7] *Maclean* v. *Dunn*,[8] *Soames* v *Spencer*,[9] *Hagedorn* v *Oliverson*[10] and in *Abdoola bin Shaik Ally* v. *Stephens*,[11] which was a case of ratification of the act of a public servant by his superior officer, and the *Secretary of State* v. *Kamachee Boyce Sahaba*.[12] See also *Kishen Kinker Ghose* v. *Borodakunth Roy*,[13] in which jurisdiction was affected by the act of ratification, and *Fuolong* v. *Bhugwan*;[14] and see also *Gool Mahomed Sait* v. *Pestonjee Nesserwanjee*,[15] *Ram Chunder Poddar* v. *Haridas Sen*,[16] *Juggesur Bhuttobyal* v. *Roodro Narain Roy*.[17]

Evidence of ratification, or implied ratification—As regards the evidence necessary for ratification proof of an express ratification is not indispensable, for inferences of ratification may be drawn from the conduct of the person for whose benefit the act was originally intended. If he means to repudiate the benefit it is his duty to express his dissent[18] within a reasonable time of his being informed of the act done on his behalf; and if he fail to do so, his adoption of the act will, generally speaking, be inferred from his silence;[19] and it appears moreover that slight evidence of ratification will be sufficient to bind the principal, as where a broker, who signed the broker's note upon a sale of corn, was the seller's agent, but the buyer acted upon the note by sending a servant to examine the bulk of the corn; on the authority of such note Lord Ellenborough held that that was such an adoption of the broker's agency as to make his note sufficient within the Statute of Frauds.[20] And in considering whether any given facts are sufficient evidence of ratification it is important to consider whether the relation of principal and agent already exists, or whether the person who has done the unauthorized act is a mere volunteer. The distinction inferred from this difference is, that in the former case, although in the particular trans-

[1] *Soames* v. *Spenser*, 1 Dow. & Ry, 32
[2] 6 El. & Bl, 868.
[3] 12 L T. N. S., 266
[4] 6 M & G., 236
[5] I. L R 5 Calc, 421
[6] 7 Mad. H. C., 369
[7] 5 Bing, 533
[8] 1 Bing, 722.
[9] 1 Dowl & Ry, 32.
[10] 2 M. & S., 485.
[11] 2 Ind. Jur. O. S. 17.
[12] 7 Moo. I A., 476.
[13] 2 Hay, 656
[14] 2 Hay, 1.
[15] 9 Mad Jur, 450
[16] I. L. R 9 Calc, 463.
[17] 12 W R. 299. [W R, 571.
[18] *Kebal Kristo Dass* v. *Ram Coomar Shah*, 9
[19] *French* v. *Backhouse*, 5 Burr., 2227
[20] *Hovil* v. *Pack*, 7 East., 164, (166).

action the agent has exceeded his authority, an intention to ratify will always be presumed from the silence of the principal who has received a letter informing him of what has been done, whereas in the latter case there exists no obligation to answer such letter, nor will silence be construed as ratification [1]

Ratification may be implied by the act and proceedings of the principal when he is fully aware of the act professed to have been done on his behalf, by weak expostulation without direct repudiation, by long acquiescence without objection, or by silence. These matters are questions of fact, and the sufficiency of evidence warranting a finding of implied ratification, is a question therefore to be determined by the Judge The evidence from which ratification may be implied, should, as will seen from the following observations of Thesiger L J, in *De Bussche* v. *Alt*,[2] be clear and cogent. His Lordship said, "It is competent no doubt to a principal to ratify or adopt the act of his agent in purchasing that which such agent has been employed to sell, and to give up the right which he would otherwise be entitled to exercise of either setting aside the transaction or recovering from the agent the profits derived by him from it; and the non-repudiation for a considerable length of time of what has been done would, at least, be evidence of ratification or adoption, or might possibly by analogy to the Statute of Limitation constitute a defence: but before the principal can properly be said to have ratified or adopted the act of his agent, or waived his right of complaint in respect of such acts, it should be shewn that he has had full knowledge of its nature and circumstances, in other words, that he has had presented to his mind proper materials upon which to exercise his power of election, and it by no means follows, that because in a case like the present he does not repudiate the whole transaction after it has been completed, he has lost a right actually vested in him to the profits derived by his agent from it. It appears to us also that, looking to the dangers which would arise from any relaxation of the rules by which, in agency matters, the interests of principals are protected, the evidence by which in a particular case it is sought to prove that the principal has waived the protection afforded by these rules, should be clear and cogent."

Different meanings of the word "acquiescence"—The term "acquiescence," is one which was said by Lord Cottenham in *Duke of Leeds* v. *Amherst*,[3] ought not to be used, in other words, it does not accurately express any known legal defence, but if used at all it must have attached to it a very different signification, according to whether the acquiescence alleged occurs while the act acquiesced in is in progress or only after it has been completed If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as

[1] Evans on Pr & Ag, 79 [2] L R 8 Ch D, (312). [3] 2 Ph, 117

really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in the case already cited, is the proper sense of the term "acquiescence,' and in that sense may be defined as acquiescence under such circumstance as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be determined on very different legal considerations. A right of action is then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release under seal. Mere submission to an injury for any time short of the period limited by statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstance; and it is clear that even an express promise by the person injured that he would not take any legal proceedings to redress the injury done to him could not by itself constitute a bar to such proceedings, for the promise would be without consideration, and therefore not binding."[1]

Instances of implied ratification.—The following are a few instances of implied ratification. Where part owners of a vessel, one of whom had affected an insurance of the vessel and had informed all his co-partowners that he had insured for all, and they stood by and did not object to what he had done, this was held sufficient evidence of ratification;[2] again where an entry of the payment of praemia had been made in a praemia book belonging to part owners of a vessel, which book was open to the inspection of the other co-partowners, who had actually inspected an extract from such book, and had made no objection to the insurance, it was held that the part owner had insured with the authority of his co-owners.[3] So where a Mrs. Adams a lady residing in England, who had given authority under powers of attorney from time to time in 1847, 1861, 1862, and 1868 to various persons for the purpose of managing her estate in India, gave such a power to one Shaw, who in 1862 granted a mocurari lease to the naib of the estate; and it appeared that he had done so after full enquiry; and subsequently one Steer was sent out to India to manage this estate (either jointly with Shaw or alone, was not clear) and he after enquiries into the matter of the lease, and as to the state of the land granted thereunder, appeared to have recognized, and by recognition confirmed the lease, and further confirming it by receipt of rents. And in 1870 the administrator of the estate of Mrs. Adams

[1] *De Bussche* v *Alt*, L. R. 8 Ch D, (314) per Lord Cottenham.

[2] *French* v. *Backhouse*, 5 Burr, 2727.

[3] *Robinson* v. *Gleadow*, 3 Bing N. C., 156.

sued to have the lease set aside on the ground that it had been granted collusively at a low rate; the charge of collusion was, however, withdrawn; Sir Richard Couch who delivered the judgment of the Court held that Shaw had authority to grant the lease; that Steer had had sufficient authority to enquire into the propriety of the pottah being granted, and, after making enquiries, to ratify what had been done, that even supposing the original transaction liable to be set aside, the ratification of it by a person having authority from Mrs. Adams to make enquiries and ratify what had been done would have rendered it valid; and finding that Steer had gone so far as to make enquiries regarding the pottah and also the state of the lands covered by it, and could find nothing improper, but on the contrary, had granted a lease of a similar nature in 1866, held that under these circumstances Mrs. Adams could not be presumed to have remained in ignorance of such acts on the part of her managers, and added: "We concur with the Sub-ordinate Judge in thinking that the owner in England must be presumed to know what was being done on her behalf by her agents. The owner got the benefit of those acts, and it is a fair presumption that she took pains to ascertain what the agent was doing, and to keep herself acquainted with the way in which the estate was being managed."[1] This judgment was subsequently affirmed by their Lordships of the Privy Council,[2] who with reference to the point of ratification, said:—"Their Lordships are unable to say that the remarks made by the High Court on that subject, are open to any substantial objection."

So where a mortgage was made by a lumbadar of his own share, and the shares of his co-sharers of certain property, as agent on their part, in order to raise money to pay Government revenue; it was held that the co-sharers being aware of the fact of the mortgage, and not having at the time repudiated it, and moreover having acquiesced in the decree of first instance which awarded them their shares on payment of their quota of the mortgage debt and interest, must be taken to have thereby consented to the act of the lumbabars which was done on their behalf.[3]

Qualified acquiescence is not sufficient.—There must, however, be more than qualified acquiescence, as where one Toolseram a proprietor of a certain mehal which was, however, in the actual possession of his nephew Doorga-Pershad, who in the year 1854, in the capacity of mortgagee of Toolseram's mehal executed on Toolseram's behalf a wajiboolurz, and at the time of execution not feeling himself in all probability fully authorized to act for Toolseram, sent for Toolseram to sign for himself, but not finding him, signed for him. Toolseram died in 1857, and his heirs mortgaged, it is pre-

[1] *Anundchunder Bose* v. *Broughton*, 17 W. R., 301.

[2] 21 W. R., 425.

[3] *Punchum Singh* v. *Mungle Singh*, 2 Agra H. C., 207.

sumed; the same mehal to some one else, (the report is very meagre, the nature of the suit not being even shown). It was contended, that there had been an acquiescence in Doorga Pershad's acts, and that the heirs of Toolseram were prevented from repudiating the competency of Doorga Pershad to bind him by the wajiboolurz; held that the original proprietor Toolseram was not bound, as Doorga Pershad had signed as mortgagee and not as agent; that even assuming Toolseram and his heirs to have been fully acquainted with Doorga Pershad's acts the most that could be inferred was that this subsequent acquiescence, supposing it to be established, was only an acquiescence in Doorga Pershad's act to the extent and in the qualified manner in which his consent was given.[1]

Ratification may be implied from silence; neglect or failure to repudiate.—Thus where a father and son, J. S. and T. J. S. respectively, as mortgagees with power of sale, agreed to sell to the plaintiff all their estate and interest in a certain peice of land. This agreement was signed by the plaintiff and by T. J. S. for himself and his father; the son had no antecedent authority to sign for his father, but the father was aware that the agreement had been entered into five days after it had been entered to, (if not before), as was proved by the father's letter to his solicitor in which he referred to his son having been so foolish as to enter into that agreement. J. S. and T. J. S. afterwards sold the land to another party. The plaintiff then brought his suit for specific performance of the agreement. Stuart V. C. held that the knowledge and acquiescence of J. S. raised a presumption of ratification and said, "It could not be considered that any express act on his (the father's) part, such as attaching his signature to the agreement or any other solemnity by him, after he became privy to the act done by his son on behalf of both, was essentially necessary. Subject to his right to a reasonable opportunity of expressing his dissent, every additional day and hour of silence after he became privy to the contract operated as tacit acquiescence and raised the assumption of assent. ..... Although he, the father, had sworn in his answer that he never recognised the agreement and had always refused to adopt it, he did not venture to state, nor was there any evidence to prove that at any specified time, or by any specified word or deed, he in any manner expressed his refusal or even acted in any manner so as to induce a belief of any such refusal or dissent before the commencement of the suit.[2]

So where a husband allowed his wife to have control over certain property, and to mortgage it; it was held that he was not to be allowed to come forward some time afterwards, and defraud the mortgagee by disputing his wife's title.[3]

[1] *Bhageeruth* v *Mohun*, 2 Agra H. C., 129.

[2] *Bigg* v. *Strong*, 4 Jur. N. S., 108; affirmed on appeal, p. 982. See also *Prince* v. *Clark*, 1 B. & C, 186. *Smith* v *Hodson*, 4 T. R, 211 *Fergusson* v *Carrington*, 9 B & C. 59.

[3] *Mooradee Beebee* v. *Syeffoollah*, W. R, (1864), 318.

But mere silence is not always sufficient[1]; Yet where a person who was a general agent borrowed money for his principal in his principal's name; the money being carried from the bank from which it was borrowed to the Treasury of the principal, and expended for his use; entries having been made in the principal's books as to the loan, and also as to the mode by which it was disbursed; portions of the loan having been paid off by ticcadars of the principal under orders or assignments. Peacock C. J. and Levinge J. held that there was a sufficient *primâ facie* case made out to show that the principal was liable for the money advanced to his agent, as the principal if he had looked into his affairs at all must have been aware of these facts, and as he did not in any way repudiate them.[2] So also where a principal receives the proceeds of a distress made without authority by his gomasta, he thereby tacitly ratifies the act of his gomasta.[3]

Ratification by inaction—of act of Guardians.—Long inaction unaccounted for will be taken as ratification.[4] As to ratification by a person who has attained majority, of acts done by his guardian during his minority see Tagore Lectures for 1887, p 382, and the cases there collected; and also the case of *Roteakant Bose* v. *Nobin Chunder Bose*.[5]

Ratification of a deed by being witness thereto.—The question how far a person can be said to ratify a deed by being a witness thereto, was discussed in the case of *Ram Chunder Poddar* v. *Hari Das Sen*,[6] there during the lifetime of a Hindu widow, her son, the then presumptive heir to certain property of which she was in possession, conveyed it to purchasers by deeds to which she was not a party. Subsequently she by separate deed ratified the conveyance. This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed became the next reversionary heir; in a suit by him after the widow's death to recover possession, it was contended that he being a subscribing witness to the deed by his mother, must be taken to have consented to and have known the effect of it and was bound by it. Garth C. J. said. "I think that as a proposition of law that doctrine cannot be maintained. No doubt if parties subscribe a deed as witnesses, and there is evidence, or the circumstances of the case induce the Judge to believe that they knew what the contents of the deed were, the Judge is at liberty to infer that

[1] *Rajnarrain Deb Chowdhry* v. *Kasheechunder Chowdhry*, 18 W R, 404.

[2] *Ramcoarse Lall Sahoo* v *Mohesh Singh*, 2 Hay, 644.

[3] *Ramjoy Mundul* v *Kallymohun Roy Choudhry*, Marsh. 282; 1 Hay. 289.

[4] *Ishan Chunder Mozumdar* v. *Sreekant Nath*, 9 W. R., 110. *Kumurooddeen Saikh* v *Bhadoo*, 11 W. R., 134. *Purmessur Ojhna* v. *Goolbee*, 11 W. R., 446 *Boidonath Dey* v *Ram Kishore Dey*, 13 W R., 166. *Doorga Churn Shaha* v. *Ram Narain Doss*, 13 W. R., 172.

[5] 2 Hay., 620

[6] I. L. R., 9 Calc., 463.

they were consenting parties to it ..... it constantly happens that persons subscribe deeds as witnesses without having the least notion what they contain; and if people were to be held bound by any instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature."

Standing by.—Standing by and taking no steps to repudiate may under certain circumstances amount to ratification.[1] But where the owner of certain land was not aware of its having been sold by his father to a third person, but having heard of such sale subsequently, stood by and allowed the purchaser to build upon this land, the owner was held not to be able to recover the land without compensating the purchaser, although it could not be said that he knew and acquiesced in the sale.[2] And when the proprietors of an estate on being informed by their agent of a proposal to obtain a lease of the property, refused their consent, and the agent notwithstanding gave the proposer a written order to take possession as lessee, but gave no notice at the time to the proprietors, but subsequently informed them of it, held that the proprietors were not under obligation to take early steps to disavow the act of their agent.[3]

Implied ratification by a Judge.—Where a Judge made an order expressed to be by consent of the parties concerned, and in exercise of his discretionary powers under Act XX of 1863, s. 16, referring certain matters in difference between the parties to three arbitrators for final determination "to make their award in writing and submit the same" within a certain period. Each arbitrator delivered a separate award, two of whom found for the plaintiff. The Judge made a decree in accordance with the award of the majority of the arbitrators. The defendant objected on the ground that there was no provision in the order of reference to the effect that the finding of a majority should prevail. Holloway and Kindersley JJ., held that there could be no doubt that the Judge might when he made the order of reference have inserted as a provision that the decision of the majority should be that of the body of arbitrators and that there was no reason why his ratification of that mode of decision, wholly within his discretion, should not be equivalent to a previous command.[4]

ESSENTIALS OF RATIFICATION.

I The Act done must have been done for or on account of the person electing to ratify.—The act sought to be ratified must be one done avowedly for, or on account of the person electing to ratify, and not one done for, or on account of the agent himself. Thus where two ladies, the adoptive mothers of

[1] *Jorden* v *Money*, 5 H. L. Cas., (213).

[2] *Suvarkal Karsandas* v. *Nusmunddin Karim*, 8 Bom. H. C. (O. C. J.), 77.

[3] *Mukbool Buksh* v *Suheedun*, 14 W. R, 378.

[4] *Immedy Kanuja Ramaya Gaundan* v. *Ramasami Ambalam*, 7 Mad. H. C., 173.

one Ramchandra, mortgaged properties which had vested in Ramchandra as the adoptive son of the ladies; Ramchandra at that time being of full age; it was sought to show in a suit brought on these mortgages by the mortgagee against the ladies and the adopted son, that the mortgages had become effectual through the subsequent conduct of Ramchandra who it was proved had promised to the ladies that he would redeem the mortgages, and had stood by and allowed the mortgagee to carry out the provisions of the mortgage deeds to his own detriment by paying maintenance to the ladies and by paying off certain mortgages created by the ladies previously to Ramchandra's adoption. Melville J, held that the mortgagee was not entitled to succeed; stating "It is in evidence that Ramchandra promised the two first defendants (the ladies) that he would redeem the mortgages; but he made no promise to the mortgagee, nor was there any consideration for such promise as he made. Nor can the promise have the effect of a ratification; for a ratification of the unauthorized contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of the principal, and not when it has been made, as in the present case, on account of the agent himself.[1]

So also where an insurance broker being instructed to effect an open policy for £5,000 for the plaintiff against jettison only "subject to declaration thereafter," and the broker being unable to effect the insurance, declared certain deck cargo shipped for Ostend on board one of the plaintiff's vessels on the back of a general policy which he had previously effected for himself "upon any kinds of goods and merchandize as interest might appear," and got this policy initialed by the underwriters; a loss by jettison having happened, it was held that it was not competent to the plaintiff to maintain an action against the underwriters upon the policy, the contract not having been made with him, nor on his behalf at the time.[2] In that case it was moreover clear that the plaintiff never intended to ratify the broker's contract *in toto*, but only so much thereof as was sought to be appropriated to him by the broker. Erle J., in his judgment in that case says, "it is clear law that no one can sue upon a contract unless it has been made by him or by an agent professing to act on his behalf; and whose act has been ratified by him." See also on this point[3] *Wilson* v. *Tumman* and *Ancona* v. *Marks*.[4]

Extension of the principle in insurance cases.—A wide extension has been given to this principle in respect of policies of insurance, *viz.*, that persons who could not be named or ascertained at the time of the policy are allowed to come in and take the benefit of the insurance; but then they must be persons contemplated at the time the policy was made. Thus in *Williams* v. *North China*

[1] *Shiddheswar* v. *Ram Chundra*, I. L. R., 6 Bom., 463.
[2] *Watson* v. *Swann*, 11 C. B N. S., 756.
[3] 6 C. B. N. S., 894.
[4] 7 H. & N., 686.

Insurance Co.,[1] where a policy of marine insurance is made by one person on behalf of another without authority, it was held that it might be ratified after the loss of the thing insured, by the party on whose behalf it was made, even though he knew of the loss at the time of such ratification. Cockburn C. J., said: "The existing authorities certainly shew that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamim asked us, as a Court of appeal, to review those authorities. His contention was that there could be only a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of two long standing to be got over. When a rule has been accepted as the law with regard to marine insurance for nearly a century, I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis of the contract. It seems to me that, both according to authority and the principles of justice, a ratification may be made in such a case" Nor in such case is it necessary that the ratification should take place during the time of the risk.[2]

II. Ratification must be by a person in existence at the time the act is done.—Ratification can only be by a person ascertained at the time of the act done by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate vest by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will.[3] The case of *Kelner* v. *Baxter*[3] is an example of the rule that where an agent contracts for a *non-existent* principal no subsequent ratification by the principal *afterwards* coming into existence will avail. There the plaintiff sold goods to the defendants, addressing them on behalf of the proposed Gravesend Royal Alexandra Hotel Company, the defendants accepted the goods on behalf of the Company, and made use of them, the Company was not at that time incorporated and did not become so

[1] L. R. 1 C. P. D, 757.

[2] *Lucena* v. *Crawford*, 2 B. & P N. R, 269, *Routh* v. *Thompson*, 13 East, 274, *Hagedorn* v. *Oliverson*, 2 M & S, 485, but see *Bell* v. *Janson*, 1 M & S., 200.

[3] Per Willes J., *Kelner* v *Baxter*, L. R. 2 C. P., 184, *Scott* v. *Lord Ebury*, L. R. 2 C P., 255.

until some time afterwards. The incorporated Company on coming into existence, ratified the purchase made on its behalf. But the Court held that the defendants were personally liable as there could be no ratification by a principal who was not in existence at the date of the contract and there being no principal for whom the defendants could be agents, they themselves were liable. On this latter point of the personal liability of the agent, the case has been questioned as is stated in Benjamin on Sales.[1] So again Williams J., in *Gunn* v. *London and Lancashire Fire Insurance Company*,[2] says:—"to make a contract valid, there must be parties existing at the time who are capable of contracting;" There it was held that a contract made between the projectors and the directors of a joint stock Company provisionally registered, but not in terms made conditional on the completion of the Company, is not binding upon the subsequently completely registered Company, although ratified and confirmed by the deed of settlement. So in *Wilson* v. *Swann*,[3] it is said "the law obviously requires that a person for whom the agent professes to act must be a person capable of being ascertained at the time. It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable description of the person intended to be bound by the contract." The case of *Kelner* v. *Baxter*[4] has been followed in *Melhado* v. *Porto Alegre Ry. Co.*[5] where Lord Coleridge J., said:—"The doctrine of ratification is inapplicable, for the reasons given in the judgments in *Kelner* v. *Baxter*. For supposing that there was a contract between the plaintiffs and certain persons before the existence of the Company which the directors had authority to ratify on behalf of the Company, the case of *Kelner* v. *Baxter* is a distinct authority to shew that the Company could not ratify such a contract, because they were not in existence at the time the contract was made." It has also been followed in the *Empress Engineering Company*[6] where a contract was entered into by A and B with C acting on behalf of a Company intended to be formed, that the former should sell to the Company a certain business, part of the terms of the agreement being that sixty guineas should be paid to J. and P. solicitors; and the memorandum of association adopted this agreement and the Directors subsequently ratified it; an order having been passed to wind up the Company, J. and P. claimed to prove for the 60 guineas, the Court held that the contract having been entered into before the Company was in existence, could not by mere ratification become binding on the Company, and that a contract between

[1] See per Williams J., in *Hollman* v. *Pullin*, Catabé & Elles, 254. Benjamin on Sales, 221.
[2] 12 C. B. N. S., 694.
[3] 11 C. B. N. S., 765.
[4] L. R. 2 C. P., 174.
[5] L. R. 9 C. P., 503.
[6] L. R. 16 Ch. D., 125.

A and B to which J and P were no parties, would not entitle J and P to proceed against the Company. In delivering judgment in this case James L. J., said, "Notwithstanding what was said by Malins V. C., in *Spiller* v. *Paris Skating Rink Company*,[1] it appears to me, that it is settled, both in the Courts of law, and by us in the Court of Appeal in the case of *in re Hereford and South Wales Waggon and Engineering Company*,[2] that a Company cannot ratify a contract made on its behalf before it came into existence, cannot ratify a nullity. The only thing that results from what is called a ratification or adoption of such a contract is not the ratification or adoption of a contract *qua* contract, but the creation of an equitable liability depending upon equitable grounds." So again *in re the Northumberland Avenue Company*,[3] a written contract was on the 24th July 1882, entered into between Wallis as trustee for an intended Company, to the effect that that Wallis who was entitled to an agreement for a lease from the Metropolitan Board of Works, should grant an under lease to the Company and that the Company should erect the buildings. The Company was incorporated on the 25th July 1882, its memorandum of association did not, however, mention the agreement, but the articles adopted it, and provided that the Company should carry it into effect. No fresh agreement with Wallis was signed or sealed on behalf of the Company, but the Company took possession of the land, expended money in building and acted on the agreement which they considered to be binding on them. The Company failed to complete the buildings and the Metropolitan Board re-entered. The Company being in course of winding up, the trustee in bankruptcy of Wallis took out a summons to be allowed to prove for damages against the Company for their breach of the agreement, which form of action amounted to an assent for damages for breach of agreement. Chitty J., decided that as the Company was not at the time of the making of the contract in existence, according to *Kelner* v. *Baxter* the contract could not be ratified. And on appeal this point was not disputed. The case of *Howard* v. *The Patent Ivory Manufacturing Company*,[4] however, is one showing the view the Courts of equity take on this subject. There one Jordan entered into an agreement with one Wyber *who purported to act on behalf of a Company about to be formed*, to sell certain property to the Company. The Company was formed shortly afterwards with a memorandum and articles of association containing provisions for the adoption of the agreement by the directors on behalf of the Company, with, or without modifications; at meetings of the directors at which Jordan was present, resolutions were passed adopting the agreement, and accepting an offer by Jordan to take payment of part of the purchase-money in debentures in lieu of cash, and directing the seal

[1] L R 7 Ch D, 368.
[2] L R. 2 Ch D., 621.
[3] L. R. 33 Ch. D., 16.
[4] L R. 38 Ch. D, 156.

of the Company to be affixed to an assignment by Jordan to the Company of the property comprised in the agreement, and to debentures to be issued to Jordan. Both of which acts were duly performed; and the Company took possession of the property. The Company was subsequently wound up, and the liquidator took from Jordan an assignment of other property comprised in the agreement; certain of the holders of the debentures allotted to Jordan brought an action to establish and enforce their securities but were met by the liquidator contending that there was no contract between the Company and Jordan. It was urged that the contract between Jordan and the Company could not be ratified by the Company on the authority of cases proceeding on the decisions in *Kelner* v. *Baxter*, and *in re the Northumberland Avenue Hotel Company*.[1] But the Court held that there was evidence that a contract was entered into by the Company under Jordan; to the effect of the previous agreement as subsequently modified by the acceptance of debentures instead of cash, and that there was, therefore, at the time when the debentures were issued an existing debt due to the Company: in other words the case was decided on the doctrine of novation.

Distinction between decisions of the Common Law Courts and those in Court of Equity.—It appears from the cases above cited that the Courts of law in England strictly apply this doctrine; and that the Court of Equity although recognizing and applying it, endeavour where it is possible and equity demands, to avoid its consequences by inferring or searching for facts creating a liability depending upon equitable grounds for the purpose of granting relief to the suitor.

Act of agent ratified by Administrator.—An instance of one of the class of cases referred to by Willes J., in *Kelner* v. *Baxter*, as to ratification by a person in existence in contemplation of law is that of *Foster* v. *Bates*[2] where goods belonging to an intestate's estate were sold after the death of the intestate and before the grant of letters of administration, by one who had been the agent of the deceased in Africa; the goods having been avowedly sold for, and on account of the estate; the administrator sued the purchaser from the agent for the price of the goods; it was held that as the act of the agent had been ratified by the plaintiff after he had become administrator, the title relating back to the time of the death of the intestate, it was no valid objection that the intended principal was unknown at the time to the person who intended to be agent

III No ratification of void and illegal and acts.—There can be no ratification of a void and illegal act.[3] For if a contract be void on the ground that the party who made it, in the name of another, had no authority to make it, this is the very thing which a ratification will cure; but if it is void on the ground of its being of itself, and in its own nature, illegal and void, no

[1] L. R 33 Ch. D, 16

[2] 12 M & W., 226.

[3] Com. Dig "Confirmation, (D. 1). Co. Litt., 295 (*b*).

ratification of it by the party in whose name it was made by another will render it a valid contract. Thus a minor cannot on coming of age ratify a mortgage of his immoveable property made by his guardian under Act XL of 1858 without the sanction of the Court, such a mortgage being void *ab initio* under the Act[1] Thus, where the defendant's name was forged by one Richard Jones to a joint and several promissory note for £20, dated the 7th November 1869 and purporting to be made in favour of one Brook by the defendant and Jones. Whilst this note was current the defendant signed the following memorandum in order to prevent the prosecution of the forger, at the same time denying that the signature to the note was his or written by his authority, "I hold myself responsible for a bill dated the 7th November 1869 for £20 bearing my signature and Richard Jones in favour of Mr. Brook (the plaintiff)." Kelly C. B., Channel and Pigott B. B., held that this memorandum could not be construed as a ratification, that it was in fact, an agreement by the defendant to treat the note as his own. in consideration that the plaintiff would forbear to prosecute Jones, and was therefore void as founded on illegal consideration.[2]

Doctrine not applicable to Criminal cases.—The doctrine of ratification does not apply in a criminal case. Thus where the question was whether a prisoner who had been tried for murder, convicted, and sentenced to death, had been tried convicted and sentenced legally, inasmuch as the appointment of the Judge who tried him, had not then been sanctioned by the Government of India as required by Act XXIX of 1845, Sausse C. J., said :—"it was suggested, rather than attempted to be argued seriously, that the well-known legal maxim *omnis ratihabitio retrotrahitur et mandato priori acquiparatur* applied to the present case, and that the subsequent ratification of the Act of the Governor in Council of Bombay, by the Governor-General of India in Council, validated all intervening judicial acts. No case was cited in which such a doctrine was upheld in a criminal case. There is neither principle nor authority to support the proposition, and it would be a misapprehension and misapplication of the principle involved in the above maxim, which is founded upon the relation of principal and agent, to apply it to a case like the present."[3]

Torts may be ratified.—An unauthorzed act founded on tort may be the subject of ratification, but a ratification of a tort will not free the agent from responsibility to third parties.[4]

[1] *Mauji Ram* v. *Tara Singh*, I L R 3 All, 852.

[2] *Brook* v. *Hook*, L. R. 6 Ex., 89.

[3] *Reg.* v. *Rama Gopal*, 1 Bom H. C., 107

[4] *Rai Kishenchand* v. *Sheobaran*, 7 All., H. C. 121 *Kallymohun Ruchowdhry* v *Ramjoy Mundul*, 2 Hay, 289 *Stephen* v. *Elwall*, 4 M & S, 259 *Abdoola bin Shaik Ally* v. *Stephens*, 2 Ind. Jur. O. S., 17. *Rani Shamasundari Debi* v *Dukhu Mandal*, 2 B L. R., (A. C. J.), 227 *Girish Chunder Dass* v *Gillenders Arbuthnott & Co.*, 2 B L R, (A. C. J.), 140.

Ratification of void and voidable acts, distinction.—There is a distinction between an endeavour to ratify a void and a voidable act, the former cannot, as we have seen, be ratified, but the latter may be; as where a usufructuary mortgage was granted by the agent of a minor to one Jeetun Ram, as was alleged, without authority, and subsequently the right, title and interest of the property mortgaged was put up for sale in execution of a decree obtained against the minor; upon the auction-purchaser at the execution sale endeavouring to take possession, Jeetun Ram set up his title under the usufructuary mortgage which had then two years to run; the Court held that the act of the agent was the act of the minor which until avoided by a distinct act on the part of the minor on his coming of age, must be considered as valid, but that as more than four years had elapsed since the minor attained majority, and he had not repudiated the usufructuary mortgage, it must be taken to be good; and that therefore all that the auction-purchaser was entitled to, was the reversion of the minor in the property after the usufructuary mortgage had expired.[1]

IV. Principal must have knowledge of material facts.—There can be no valid ratification made by a person whose knowledge of the facts of the case is materially defective.[2] The principle by which a person, on whose behalf an act is done without his authority, may ratify, and adopt it, is as old as any proposition known to the law, but it is subject to one condition in order to make it binding; it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events, and under whatever circumstances.[3] Thus where the plaintiff let to Umesh Chunder Banerjee, who had been employed by the defendants, a cargo boat to land certain goods, and during the landing of the goods a dispute as to the terms of hiring arose, and on Umesh Chunder refusing to pay what was alleged by the plaintiff to be due to him for the hire of the boat, the plaintiff refused to give up certain bales then remaining unlanded from his boat. Umesh Chunder thereupon communicated the circumstances to an assistant in the defendant's firm, who afterwards went to Umesh Chunder and forcibly took the goods from the plaintiff's boat without satisfying the plaintiff's lien thereon, and the defendant's firm received them into their godowns. It was proved that Umesh Chunder and the assistant acted without the knowledge or authority of the defendants, and that the defendants received the goods without any knowledge of how they had been obtained except so far as letters written by the plaintiff's attorney to them may have conveyed knowledge of the fact that the plaintiff claimed a lien on the goods, such letter giving no information as to the circumstances

[1] *Huree Ram* v. *Jeetun Ram*, 12 W. R., 378 See also *Kebal Kristo Doss* v. *Ramchunder Shah*, 9 W R. 571.

[2] *Savery* v *King*, 5 H. L. Cas., 627. Ind. Contr. Act, s. 198.

[3] Per Willes J, *Phosphate of Lime Co.* v. *Green*, L. R. 7 C. P, 56.

under which the goods had been taken; Peacock C J., held that in the absence of such knowledge on their part, the receipt of the goods by them did not amount to a ratification of the wrongful act of their assistant and Umesh Chunder so as to render them liable in an action by the plaintiff for damages [1] On the question of the effect of the receipt of the goods, Peacock C J "The letter (written by the plaintiff's attorney to the defendants demanding the return of the goods) did not state or inform them of the circumstances under which the goods had been taken out of the plaintiff's possession, but merely tells them that Messrs Judge and Heckle who were the plaintiff's attorneys, had been consulted with reference to the defendants having trespassed on his cargo-boat and taken forcible and wrongful possession of the goods ..... The defendants knew that they had not committed any trespass on the plaintiff's cargo-boat; and this letter gave them no such knowledge or notice of the circumstances as rendered their subsequent receipt of the goods a ratification of the trespass. It might have put them to an inquiry as to the circumstances under which the goods had been taken, but they were not bound to make that inquiry, and the fact of their not inquiring, could not convert their subsequent receipt of the goods, without knowledge of the real state of the facts, into a ratification of what they did not know." But where a landlord directed a bailiff to distrain for rent, giving special directions to the bailiffs to take goods only on the demised premises, and the bailiffs took some cattle belonging to the persons outside the demised premises; and the baliff after sale, made over the whole sale proceeds to the landlord. Parke B held that the act of the landlord in directing the sale of the cattle and receiving the proceeds was a sufficient ratification of the acts of the bailiffs in making the distress as to such of the cattle as were taken on the demised premises, because the taking of them was within the original authority given; but that as to the others taken outside the demised premises, the landlord could not be liable, *unless he ratified the acts of the bailiffs with knowledge* that they took the cattle elsewhere than on the demised premises, or unless he meant to take upon himself, without enquiry, the risk of any irregularity which they might have committed and to adopt their acts [2] Both acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby; therefore where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for its own purposes:—held that the doctrine of acquiesence and rati-

[1] *Grishchandra Das* v *Gillander, Arbuthnot & Co*, 2 B L. R O C, 140

[2] *Lewis* v *Read*, 13 M & W, 834 See also *Smith* v *Calogan*, 2 T R, 188, (note) and *Kallymohan Roy Chowdhry* v *Ramjoy Mundal*, 2 Hay. 289

fication by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed.[1]

V. No ratification of part of a transaction—There can be no ratification of a part of a transaction. Where a person has ratified any unauthorized act done on his behalf he thereby ratifies the whole of the transaction, of which such act forms part.[2] So if a principal adopts the act of an agent in respect of a purchase of property, he must take the property subject to the conditions which the agent has incumbered it with, notwithstanding any secret arrangement between the agent and himself unknown to third parties.[3]

Effect of ratification—The effect of ratification is that the principal thereby becomes responsible for the acts done on his behalf, in the same manner as though such acts had been originally performed by his previous authority.[4] As against the principal the ratification is retroactive and is equivalent to a prior command. Its effect as between the principal and agent is that immediately a transaction is ratified by the principal, the agent is relieved from all responsibility in the matter; its effect on him is therefore to absolve him from all loss or damage arising out of his previous unauthorized act. Its effect as between the third party and the agent, is that it will relieve the latter from all responsibility, save in the case of a ratification of a tort committed by the agent; for in such case both the principal and agent will be liable to such third person. Its effect as between the third party and the principal, is that as soon as the ratification has taken place, the former is in a position to demand from the principal full performance of the contract or other transaction entered into by his agent. As between the principal and third parties, although ratification will in general bind the principal and render him liable to be sued by such third party, yet this rule is not universally applicable; where the act is beneficial to the principal and does not create an immediate right to have some act or duty performed by a third party, but amounts simply to the assertion of a right on the part of the principal, there the rule seems generally applicable. But where the unauthorized act done by the agent, would, if authorized, have the effect of subjecting the third person to damages, or of terminating any right or interest of the third person, it cannot, by rati-

[1] *La Banque Jacques Cartier* v. *La Banque D'Epargne de la cite du Montreal*, L. R. 13 App. Cas, 111.

[2] Ind Contr. Act, s. 199. *Hovil* v. *Pack*, 7 East, 163. *Smith* v. *Hodson*, 4 T. R., 217. *Wilson* v. *Poulter*, 2 Str., 858. *Bristowe* v. *Whitmore*, 9 H. L Cas., 391.

[3] *Ishenchunder Singh* v. *Shama Churn*, W. R, (1864), 3.

[4] Ind. Contr. Act, s 196. *Soames* v *Spenser*, 1 D & R, 32. *Maclean* v. *Dunn*, 4 Bing, 722, 727. *Pestonjee Nesseruanjee* v. *Gool Mahomed Sahib*, 7 Mad. H. C, 369. *Barron* v. *Denman*, 2 Ex., 167, (188).

fication, be made to have such effect.[1] Thus if A holds a lease from B, terminable on three months' notice; C, an unauthorized person gives notice of termination to A. Such notice cannot be ratified by B, so as to bind A.[2] This illustration appears to have been taken from a case put by Parke B., in delivering judgment in *Buron* v. *Denman*,[3] there it is said that notice to quit given by an unauthorized agent to a tenant is not good and cannot be ratified; and the ground of this is, that it is a notice to quit an estate, and the tenant is entitled to such notice as he can act upon with certainty at the time when he receives it, so that he may deliver up possession at the end of the period of notice without being liable to further claims in respect to the remainder of the term.[4] So a demand of goods made by an unauthorized agent on behalf of the owner will not by subsequent ratification by the owner support an action of trover.[5] It will be noticed that the unauthorized act of the agent cannot be ratified by the principal if it would have effect of subjecting a third person *to damages*, or of terminating any right or interest of a third person; the word "damages" must, I think, be considered as meaning legal damages; and it is therefore uncertain whether the section would cover a case when the third person is put to the expense and consequent loss in costs of a successful suit for specific performance brought against him by the person for whom an unauthorized agent is acting. If this view is correct, then an act by an unauthorized agent which merely makes a third person liable to a suit for specific performances, as distinguished from a suit for damages, might fall within the principle of *Bolton Partners* v. *Lambert*[6] and admit of the act being ratified by principal. That case was, however, decided in 1889, long after the Contract Act was passed, and is an extension of the principle of the relation back of ratification to the original act done by an unauthorized agent. But whether the case can be said to be within s. 200 or whether it falls without it, the case should not be passed over. In the case referred to, an offer of purchase was made by the defendant to Scratchley, who was the agent of Bolton Partners (the plaintiffs), but was not authorized to make any contract for sale; the offer was accepted by Scratchley on behalf of the plaintiffs. The defendant withdrew his offer, and after the withdrawal, the plaintiffs ratified the acceptance of the offer by Scratchley. In an action by the plaintiffs for specific performance, it was held that the ratification of the plaintiffs related back to the acceptance by Scratchley, and therefore the withdrawal by the defendant was inoperative, and the plaintiffs were entitled to specific performance. It will be noticed that the question under the Contract

[1] Ind. Contr. Act, s. 200.
[2] Ind Contr. Act s. 200 ill. (*b*)
[3] 2 Ex, 167, (188).
[4] Story, 246.
[5] *Solomons* v. *Dawes*, 1 Esp., 83.
[6] L. R. 41 Ch D., 295.

Act would be whether the act of Scratchly in accepting the offer, *would have* the effect of subjecting the defendant *to damages*, it *might* have done so, if he had merely accepted the offer and failed to carry it through; but it *would* not necessarily have done so, for he might have sold.

Doctrine applied to acts done by Directors. Ratification of irregular transaction by assent of shareholders.—There is, however, yet another class of cases which should be referred to, and that is the class of cases in which the doctrine of ratification has been applied to acts done by directors of a Company when acting in excess of their powers. Such transactions in the conduct of a Company's affairs though in their inception invalid, may nevertheless be made binding, as between the Company and it's shareholders, by the subsequent ratification or assent of all the shareholders even though such assent be informal and shown only by acquiescence. It must however, be remembered that transactions of a Company which are *ultra vires* in the strict sense of the word, are no more capable of being ratified than are transactions which are void for illegality. This may be seen from the words of Lord Chelmsford in the *Ashbury Railway & Carriage Company* v. *Riche*.[1] "The contract entered into by Mr. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Company's Act, was absolutely void. It is exactly in the same condition, as if no contract at all had been made, and therefore a ratification of it is impossible. If there had been an actual ratification, it could not have given life to a contract which had no existence in itself, but at the utmost it would have amounted to a sanction by the shareholders, to the act of the Directors, which if given before the contract was entered into, would not have been valid, as it does not relate to an object within the scope of the memorandum of association." Transactions, however, which are not *ultra vires* in the strict sense of the word that is, which are not outside the powers of the Company, but are outside the power of any majority, however numerous, not amounting to the entire body of the shareholders, can be ratified. It is of such transactions, I now propose to refer to. As to whether in such cases the acquiescence has been made out, is a question for the Judge, and to establish it, it has been said, that there must be something more than probability, or even stronger than probability, there must be facts from which the inference of authority may legitimately be drawn.[2] And again in *Phosphate of Lime Co.* v. *Green*[3] it has been pointed out the direction which such facts should take, namely that, "in establishing such ratification it is enough to show circumstances which are reasonably calculated to satisfy the Court that the thing to be ratified came to the knowledge of all the shareholders who chose to

[1] L. R. 7 H. L., 653, (679).

[2] Per Williams J., in *Fitzgerald* v. *Dresser*, 7 C. B. N. S., 374.

[3] L. R. 7 C. P., 43.

enquire, all having the opportunity and means of enquiry." And in *Jehangir Rustomji Mody* v. *Shamji Ludha*,[1] Sarjent C. J., has said that "there can be no acquiescence without knowledge of the circumstances, but a knowledge of so much of the circumstances as would put a reasonable man to further enquiry is sufficient, and the fact that he makes no further enquiry, is the strongest proof that he acquiesces.

Acquiescence by Directors.—Instances of irregular transactions by Directors being ratified or not, have arisen most frequently in cases turning on the question, whether directors have borrowed money in excess of their powers. And on this question, the judgment of Wilson J, in *Kernot* v. *Walton*,[2] is most instructive, as laying down the principles of law, when such transactions are sought to be valid on the ground of subsequent ratification. In the particular case referred to, under the articles of Association of a limited Company the directors had power, from time to time, without any previous consent of the shareholders to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the Company upon such terms as they might think proper, and had power with the sanction of a special resolution of the Company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with Rs 50,000, the sum of Rs 1,00,000: one Kernot advanced in 1879 to the Company a sum of Rs 60,000; no previous sanction was given to any of these advances, although a general meeting of shareholders was called on the 18th April 1879, at which a resolution was passed empowering the directors in addition to the sum of Rs 50,000 mentioned in the Articles of Association, to borrow a further sum of Rs. 50,000. This resolution was, however, never confirmed. On the 4th October 1879, an extraordinary general meeting of the shareholders was held, at which meeting a resolution was passed sanctioning a mortgage to Kernot of the whole of the Company's property with the exception of a garden, to secure the payment of a sum not exceeding Rs. 1,00,000 for advances already made and to be made, with interest at 7%. This resolution was confirmed and the mortgage was executed in December 1879. Subsequently the Company was ordered to be wound up, and Kernot advanced a claim against the Company for Rs. 1,20,787. A shareholder named Campbell had, however, objected at all those meetings to the borrowing of money for the use of the Company and to the mortgage, but his objections had been overruled. Wilson J., held that the transaction of the Company, if valid were valid on the ground of being within the scope of the authority of the directors, or on the ground of subsequent ratification That the principles of law applicable to this latter ground, showed (1) that any act in excess of the Memorandum of Association is wholly invalid and cannot be ratified *Ashbury Ry Co.* v.

[1] 4 Bom. H. C. (O. C. J), 185. [2] I. L. R. 9 Calc., 14.

Riche,[1] (2) that an act of the directors *ultra vires* of the directors under the articles of Association, but not beyond the powers of a majority as restricted by the articles of Association, stands on a different footing, and that such an act can be ratified by a meeting of shareholders duly called *Irvine* v. *The Union Bank of Australia*[2] (3) that if the articles of Association restrict the powers not only of the directors but of the majority of the shareholders, and those restrictions have not been observed, so that the act done is outside the articles of Association altogether, and *ultra vires* not only of the directors, but of the meeting which has done or sanctioned it, the act, provided it be within the scope of the Memorandum, may be ratified, but the ratification must be that of the whole body of shareholders *Phosphate Co.* v. *Green*.[3] That it was under the last head that the case then before him fell, and as the acts of the directors were beyond the powers of the directors, and beyond the powers of a majority, (because dealing with the question of borrowing, article 13 of the articles of association imposed restrictions on borrowing, *viz.*, that it must be with the sanction of a special resolution previously given at a general meeting, and this expressly excluded a subsequent ratification by any majority of shareholders,) therefore in so far as the borrowing was in excess, it could only be ratified by the whole body of shareholders, which in the case of the *Phosphate Company* v. *Green*, was held to have been given by the tacit acquiescence of the shareholders, who had full knowledge and opportunity to object. That at the end of 1878 the Company had borrowed in excess of its borrowing powers Rs. 13,000, and that the resolution of 13th April not being a special resolution, the validity of the borrowing under it must depend on ratification. That although in March 1880 the report and accounts were circulated to the shareholders, which in April were adopted, yet there was clear evidence that Campbell one of the shareholders had dissented throughout from the whole of these transactions, that it could not be assumed that he had ever intended to ratify any of the transactions which were done irregularly, and that the absence of assent by him was as sufficient as the objection of all. The learned Judge therefore found that the excess of borowing beyond the powers defined in the articles of Association, was not good in the first instance, and had never been effectually ratified as to all sums borrowed within the Rs. 50,000 limit, but that as to all sums borrowed under the mortgage within the 100,000 limit, with all interests, the loan was valid. On appeal from this judgment, the Court without demurring to the principles of the law laid down by the learned Judge held following *In re Cefu Mining Company*[4], *Waterlow* v. *Sharpe*,[5] and *in re German Mining Co.*[6] that there was a distinction between loans which a

[1] L. R. 7 H L., 653
[2] I. L. R 3 Calc, 280.
[3] L R 7 C. P., 43
[4] L R 7 Eq, 83.
[5] L R. 8 Eq, 501.
[6] 4 DeG. M. & G, 19.

Company is empowered to raise under its borrowing powers, and debts which in meeting its current liabilities and in the actual carrying on of its affairs, the Company or its agents, on its behalf, have contracted, and that the advance by Kernot did not amount to a borrowing within the articles of Association. The decree of Mr. Justice Wilson was therefore amended as far as it disallowed that portion of the debt due to Kernot previously to October 1879 in excess of Rs. 50,000 [1].

Ratification of particular acts done by directors in excess of their general authority given by the Articles of Association, does not extend the power of the directors so as to give validity to acts of a similar character done subsequently.—This is exemplified by the case of *Irvine* v. *Union Bank of Australia* [2]. In that case on the 23rd December 1867, the directors obtained a letter of credit No. 150 for £10,000, and on the 11th September 1868, a letter No. 141 for £50,000, and stated to that effect in their report of the 29th October 1868, which was ratified at the half yearly meeting of that date. Letter No. 150 expired on the 29th March 1869, but was renewed. On the 9th September 1869, the directors obtained another letter of credit No. 153 for £50,000, but this act was never assented to or ratified by the shareholders. In a suit by the Union Bank against the assignee of the right, title, and interest of the Oriental Rice Company to enforce an equitable mortgage which had been granted by the Company to secure advances made by the Bank, which with interest amounted to £15,296, it appeared that the then actually paid up capital was never more than £17,000; and that at the end of 1870 the balance due to the bank was £8; and that the sums claimed in the suit had been advanced in February 1871, *viz.* £10,000, under letter No. 150 and £50,000, under letter No. 153. It was contended by the Bank that the limitation of the power of borrowing was merely a limitation of the authority of the directors, and that it was not a limitation of the general power of the Company, or of the whole body of shareholders and that the acts of the directors in excess of their authority might be ratified by the Company and rendered binding. Their Lordships considered that this contention was correct, that it would be competent for a majority of the shareholders present at an extraordinary meeting convened for that object, and of which object due notice had been given, to ratify an act previously done by the directors in excess of their authority; and that they would not have been prepared to say that if a report had been circulated before a half yearly meeting distinctly giving notice that the directors had done an act in excess of their authority and asking the meeting to confirm the report and ratify the act, this might not be sufficient notice to bring the ratification within the competency of the majority of the shareholders present at the half yearly meeting; but that if

[1] *Kernot* v. *Walton*, I. L. R 9 Calc., 14. [2] L R. 2 App Cas., 366, I. L R 3 Calc, 280

the object was to give the directors in future an extended authority beyond their borrowing powers, their Lordships considered that it would be an alteration of the provisions contained in the articles which under those articles could be made by a vote of one-half of the shareholders. Their Lordships, however, were of opinion that there was no evidence to show that any sufficient notice of the effect of the report, which was intended to be presented at the half yearly meeting, was given to the shareholders so as to lead the absent shareholders to imagine that the directors intended to report that they had exceeded their authority, or that, by the adoption of the report to be laid before the meeting, an act of the directors in excess of their authority could be rendered binding upon the whole body of shareholders. Their Lordships, therefore, held that the ratification of the report of the 29th October 1868, did not authorize the directors to obtain the letter of credit, No. 153 in September 1869, or to borrow £5,000 thereon in February 1871, and that the ratification of the letter of credit No. 150 for £10,000 did not authorize the renewal of it, or the acting upon it, after the term originally limited had expired; and that the ratification at a half yearly meeting of a particular act of the directors in excess of their powers would not extend the authority of the directors so as to do similar acts in future.[1] With reference to two apparently divergent passages in the case at pages 374, 375 of the report, Cotton L. J. in *Grant* v. *United Kingdom Switchback Ry*[2] expressed his opinion that being in the same judgment they must be taken together and that they appeared to express, "that power to do future acts cannot be given to directors without altering the articles, but that a ratification of an unauthorized act of the directors only requires the sanction of an ordinary resolution of or general meeting if the act is within the power of the Company."

Ratification of alteration in Articles of Association.—But the ratification of an unauthorized contract by a Company is entirely different from the ratification of a contract which is prohibited by the Articles of Association. Thus where the articles of a Company known as Thomson's Patent Graseby Switchback Railway Company authorized the sale of part of its undertaking to any other Company, and contained a proviso prohibiting any director from voting in respect of any contract in which he was interested. The directors of the Thompson Company on the 13th September 1888 entered on behalf on the Company into a contract for sale of part of its undertaking to the United Kingdom Switchback Railway Company, of which all the directors of Thompson's Company except one, were directors. Article 152 enabled the Company to alter their articles by special resolution. On the 28th October 1888 an extraordinary meeting of the shareholders of the Thompson's Company,

[1] *Irvine* v. *Union Bank of Australia*, L. R. 2 App. Cas, 366 I L R. 3 Calc. 280.

[2] L. R. 40 Ch. D, 139

was held, at which a resolution was proposed "that the agreement of the 13th September 1888 between the Companies be and the same is hereby approved and adopted, and that the directors be and are hereby authorized to carry into effect the same agreement." The notice summoning the meeting, stated that the resolution would be proposed, but did not suggest any reason why the contract could not be carried into effect without the sanction of a general meeting. The resolution was passed, but not in such a way as to make it a special resolution A suit was then brought by one Grant against the two Companies to restrain them from carrying out this agreement and an injunction was moved for on the ground that the directors of Thompson's Company had no authority to enter into the contract as the articles prohibited a director from voting upon a contract in which he was interested Mr Justice Chitty refused an injunction, and on appeal it was urged for the appellant that the directors could not, being interested, make a contract which would bind their Company, and that a general meeting could not by a mere ordinary resolution affirm that contract, for that to do so would be an alteration of the articles, which could only be affected by special resolution. Lord Justice Cotton on this last point said; "The ratifying a particular contract which had been entered into by the directors without authority, and so making it an act of the Company, was quite a different thing from altering the articles. To give the directors power to do things in future which the articles did not authorize them to do, would be an alteration of the articles but it is no alteration of the articles to ratify a contract which has been made without authority." On the question as to whether the contract was a nullity, his Lordship said, "There was a contract entered into on behalf of the Company, though it was one which could not be enforced against the Company, article 100 prevented the directors from binding the Company by contract, but there was nothing in it to prevent the Company from entering into such a contract" Lord Justice Bowen held that the Company did not purport to alter the limits of the authority given generally by the articles to the directors; that although the articles did limit that authority, yet there was nothing in them to prevent the Company from giving special power to the directors in a particular case as to a particular contract; the Company having adopted the contract at a general meeting made it their own, which was a ratification of an unauthorized act, not an alteration of the articles.[1]

[1] *Grant* v *United Kingdom Switchback Ry Co*, L R 40 Ch D, 135 58 L J Ch D, 211.

LECTURE IV.

REVOCATION OF THE AUTHORITY

How authority may be revoked—May be express or implied—Examples of express and implied revocation—General rule applicable to all cases where authority has not been exercised at all—Exception where authority is coupled with an interest—If exercised must be revoked on reasonable notice—What is reasonable notice—No effect on agent and third parties until notice—Revocation of agency for a fixed period—Compensation for revocation of such agency—Renunciation by agent—By completion of agency business—By the death of the principal—Exception to this rule—Agent's duty on termination of agency by death of principal—By death of agent—By unsoundness of mind of Principal—Knowledge of unsoundness of mind—By unsoundness of mind of agent—By insolvency of Principal—Notice of insolvency—Agent's insolvency—Effect of insolvency of agent on principal's rights—Termination of authority of sub-agents—Resumé—Revocation of Trusts.

How the authority may be revoked.—The first and most obvious mode by which revocation can be made, is by a revocation on the part of the principal. For inasmuch as the authority in the first place is of the will of the principal and for his benefit, it follows that it can be exercised only so long as the principal desires. The general rule therefore is, that an agency may be terminated by the principal revoking his authority.[1]

Express or implied—Such revocation may be either express, or implied by conduct.[2] Express revocation may be given either in writing by formal or informal instrument, or verbally, but it should be clear and unmistakable. It may be implied either by inference from the contents of the contract of agency, or from, as has been stated, the conduct of the principal.

Express.—It is hardly necessary to give instances of express revocation, but one may be found in *Hurst* v. *Watson* where one Watson requested a man named Hurst to sell for him a plot of land on the esplanade in Bombay at any rate exceeding the price at which he Watson had himself bought it, agreeing to give Hurst the agent, half the net profits of the sale as remuneration; and Watson shortly after giving these directions wrote to Hurst a letter revoking the authority given, which letter was duly received by Hurst. Subsequently to this revocation, Hurst who had secured a purchaser for the land, communicated this offer to Watson but it was not accepted by him On a suit brought on the agreement by Hurst against Watson, it was held that Hurst could not recover on the agreement, which had not been performed on his part,

[1] Ind Contr. Act, s. 201. Vinor's Case 8 Co. 81 *b*. *Bullakee Lall* v. *Indurputee Kowar* 3 W R. 41.

[2] Ind Contr. Act, s. 207

the obtaining the offer after revocation not having the effect of putting him in the same position as if the agreement had been performed.[1] A further instance of an express revocation is found in *Toppin* v. *Healey*,[2] there the defendant employed the plaintiff to negotiate a loan on some of the defendant's property, the plaintiff to be paid commission if he procured the loan, but none if he did not; before the plaintiff had done anything in the matter the defendant wrote to him, varying the terms on which he would accept the loan. The plaintiff endeavoured to obtain it on the latter terms, but failing to do so obtained an offer for a loan on the terms of the first authority, which the defendant refused to accept. The plaintiff sued the defendant for commission upon work and services rendered. Erle J., held that it was clear law that where an agent is employed, that employment may be revoked before performance, and that the plaintiff was not entitled to recover.

Implied.—Instances from which implied revocation may be inferred present more difficulty, and no general rules can be well laid down, but there are circumstances under which it can be inferred. For instance a power containing a provision for the donor to be at liberty to appoint another agent in the place and stead of the agent originally appointed, has been held, if exercised, to be an implied revocation of the authority.[3] And again as where a man employs another to sell a house for him and before that other sells the house, he sells it himself; or as where I appoint an agent to sell my house and I subsequently appoint another person to sell the same house for me, this would amount to an implied revocation. Decisions on this point are, however, few and indirect; the authority most in point is the case of *Dickinson* v. *Dodds*.[4] There the owner of property signed on a Wednesday a document which purported to be an agreement to sell it to one Dickinson at a fixed price. But a postscript was added which he also signed that "the offer was to be left over until Friday 9 A. M." The owner sold it to another person before Friday. Subsequently, before 9 A. M. on Friday, Dickinson accepted the offer: held that the offer to sell to Dickenson could be withdrawn before acceptance, and that a sale to a third party which came to the knowledge of the person to whom the offer was made was an effectual withdrawal.

General rule when applicable.—The general rule, however, that an agency may be determined by the principal revoking his authority, is strictly applicable to all cases where the authority has not been exercised at all.[5] It

[1] *Hurst* v. *Watson*, 2 Bom. H. C., 400. See also *Lumley* v. *Nicholson*, W N., (1886), 120.

[2] 11 W. R. (Eng.), 466.

[3] See *Vishnucharya* v. *Ramchandra*, I. L. R. 5 Bom., 253. See also *Bristow* v. *Taylor*, 2 Stark, 50.

[4] L. R. 2 Ch. D., 463. See also *Stevenson* v. *McLean*, L R 5 Q. B. D, 351.

[5] Ind. Contr. Act, s. 203. *Gibson* v. *Minet*, 9 Moo, 31.

will not, however, apply where the agent has himself an interest in the subject matter of the agency, for in such case, the authority cannot, in the absence of an express contract to the contrary, be terminated to the prejudice of such interest.[1] On this point Hawkins J. in *Read* v. *Anderson*,[2] when dealing with the implied authority in a commission agent to pay a bet which he had been employed to make, said :—"As a general rule a principal is no doubt at liberty to revoke the authority of his agent at his mere pleasure; but there are exceptions to this rule, one of which is, that when the authority conferred by the principal is coupled with an interest on good consideration, it is in contemplation of law irrevocable, that is, though it may be revoked in fact, that is to say, by express words, such revocation is of no avail. In the present case the authority to pay the bets if lost was coupled with an interest; it was the plaintiff's security against any loss by reason of the obligation he had personally incurred on the faith of that authority to pay the bets if lost, the consideration for that authority was the taking upon himself that responsibility at the defendant's request. Previous to the making of the bet, the authority to bet might beyond all doubt have been revoked; but the instant the bets were made and the obligation to pay them if lost incurred, the authority to pay became, in my judgment, irrevocable in law. In other words, the case may be stated thus. If a principal employs an agent to do a legal act, the doing of which may in the ordinary course of things put the agent under an absolute or contingent obligation to pay money to another, and at the same time gives him an authority, if the obligation is incurred, to discharge it at the principal's expense, the moment the agent, on the faith of that authority, does the act, and so incurs the liability, the authority ceases to be revocable ..... The opinion I have expressed as to the irrevocability of the authority to pay lost bets applies only to cases where the agent by the principal's authority makes the bet in his own name, so as to be personally responsible for them" That the authority must be coupled with an interest *for good consideration*, is shown by the case of *Raleigh* v. *Atkinson*,[3] where the authority was held to be revocable on the ground of want of consideration.

Coupled with an interest, meaning of.—The term "authority coupled with an interest," has been explained to mean "an agreement given on sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority."[4] According to the case of *Smart* v.

[1] Ind. Contr. Act, s. 202. *Bristow* v *Taylor*, 2 Stark, 50, 51. *Bromley* v. *Holland*, 7 Ves., 28. *Walsh* v. *Whitcomb*, 2 Esp, 565. *Gaussen* v. *Morton*, 10 B. & C., 731. *Hurst* v. *Watson*, 2 Bom. H. C. 400, *Fisher* v. *Miller*, 7 Moo, 527. *Abbott* v. *Strotten*, 3 Jon. & Lat., (613).

[2] L. R 10 Q. B. D., 107.

[3] 6 M. & W, 670

[4] *Smart* v *Sandars*, 5 C. B, 895.

Sandars[1] this doctrine in England, has been held to apply only to cases where the authority is given for the purpose of being a security, or as Lord Kenyon expresses it, "as a part of the security;" not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidently only; as for instance, where goods are consigned to a factor for sale (which confers an implied authority upon the factor to sell;) and afterwards the factor makes advances; such would not be an authority coupled with an interest, but is an independent authority, and an interest subsequently arising. *Smart* v. *Sandars* has been followed in *De Comas* v. *Prost*.[2] So again in *Walsh* v *Whitcome*,[3] Lord Kenyon expressed himself on this point as follows:—"In general they (powers of attorney) are revocable from their nature; but there are exceptions; where a power of attorney is part of a security for money, there it is not revocable; where a power of attorney was made to levy a fine as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security, such is not revokable." There may, however, be some doubt whether the distinction laid down in *Smart* v. *Sandars*, and the other English cases cited, is strictly followed out by the words of section 202 of the Contract Act; the words there used appear to be wide enough to include cases where the authority is given independently, and the interest of the donee of the authority arises afterwards. For the agent may himself have an interest in the property which forms the subject matter of the agency, in cases in which he has made advances and has a lien therefor; and it appears clear that where he has such an interest, revocation of the authority, might be prejudicial to such interest; on the other hand illustration (*b*) to this section appears to point to the consignment and the power to sell being given at the same time for advances incurred, and if so, this would fall within the rule as laid down by Lord Kenyon; illustrations have, however, been held to form no part of an Act;[4] and as there are no Indian decisions raising the question under discussion, the question must be left in doubt until it is judicially decided on.

Arrangement to pay salary out of rent gives no interest.—An arrangement to pay a salary out of rents, will not amount to an authority coupled with an interest; thus, where a person by an agreement in the nature of a letter of attorney constituted another manager of his property, empowering him to

[1] 5 C. B., 895, (918).

[2] 3 Moo. P. C. N. S., 158, (165), (179).

[3] 2 Esp. 565 See also *Gaussen* v. *Morton*, 10 B. & C., 731. *Hodgson* v *Anderson*, 3 B & C., 842.

[4] *Manak Ram* v. *Mabir Lall*, 1 L. R. 7 All., 487. *Koylashchunder Ghose* v. *Sonatum Chung Baroote*, I. L. R 7 Calc., 132. As to the intention of the Legislature with regard to the object of illustrations, See Stokć's Subst. Law, p. XXIV.

collect the rents, and to take Rs. 42 annually out of the rents collected; and agreeing that if the work was done by others, he would give the manager generation after generation the sum of money above mentioned, held that the mere arrangement that the manager's salary should be paid out of the rents, could not be regarded as giving to the manager an interest in the property which formed the subject matter of the agency.[1]

But save where agent has an interest, authority may be revoked at any time before exercised.—But save where the agent has an interest in the subject matter of the agency, an agency may be revoked at any time before the authority has been exercised so as to bind the principal.[2] Where, however, the authority is capable of severance, in such case, notwithstanding it has been partly exercised, it may be revoked as to the part unexercised, though not as to the part exercised.[3]

But on reasonable notice —It has been said that a principal can revoke his authority at any time,[4] if, however, he intends to revoke his authority, he must do so definitely and unmistakeably,[5] and by a reasonable notice to his agent of his intention so to do; otherwise, he will render himself liable to the agent for any damage resulting from want of such notice.[6] The measure of such damage would be probably that the agent would be entitled to receive such compensation for loss caused to him from want of notice, as would naturally arise in the usual course of things from such conduct, or which the principal and agent knew when the contract of agency was entered into, would be the likely result of such want of notice; but compensation will not be given for any remote or indirect loss or damage sustained by the want of notice, but it certainly would include all expenses rightly incurred on their principal's account after the revocation and before it became known to him.[7]

Reasonable Notice —"Reasonable notice" is not easy to define; for what is reasonable in one case may not be so in another; probably it means such notice in point of time as would reasonably be sufficient, under the circumstances of each particular case, to warn the agent not to incur further expenses in the matter of the agency and to cease from acting therein as regarded acts remaining unexercised under the authority. At all events the knowledge of the revoca-

[1] *Vishnucharya* v. *Ramchandra*, I L R 5 Bom. 253.

[2] Ind. Contr. Act, s 203. See *Eltham* v *Kingsman*, 1 B. & Ald, 681, per Lord Ellenborough (683) *Taylor* v *Lendley*, 9 East, 49.

[3] Ind Contr. Act, s 204 *Watson* v *Hurst*, 2 Bom., 400.

[4] *Balakee Lall* v *Indurpatee Kowar*, 3 W. R 41.

[5] *Loring* v *Davis*, L R 32 Ch. D, 625

[6] Ind Contr. Act, s 206. See however the case of *Govindan* v *Kannaram*, I L. R 1 Mad, 351 Malabar law but in which the fact of bringing the suit may be taken as notice.

[7] See *Loring* v *Davis*, supra.

tion should be made co-extensive with the knowledge of the authority having been granted. The mere posting of a letter containing notice of revocation would not be sufficient, for the revocation will not have effect from the date of the letter, or the date of its despatch, but only from the date of its actual receipt by the agent; for as Bramwell L. J. says in the *Household Fire Insurance Company* v. *Grant*[1] "a letter not a delivered is not a communication." It is true that case was one as to whether a letter of acceptance which had miscarried was binding on the proposer or not, and refers to the rule that an acceptance of an offer by post despatched in due time concludes a contract, but there is no reason why the same rule should not apply. A principal therefore when sending a revocation by post is in the position only of a person who is desirous of revoking his authority during every instant of the time the letter is travelling, but who only can succeed in attaining his desire when the letter has reached the hands of his agent, and its contents are made known to him. The question of notice of termination of an agency appear to stand on somewhat the same footing as a notice of termination of a partnership; this is usually done in this country by advertisement in the papers or circulars. And it has been held by Garth C. J., in *Chunder Churn Dutt* v. *Eduljee Cowasjee Bijnee*.[2] that special notice in the case of a dissolution of a partnership, should be given to all old customers of a firm.

Knowledge of revocation —But in any case the revocation of the authority will have no effect as against the agent, until it is known to him, or, as against third parties until it is known to them.[3] A similar protection is afforded, to an agent under the Power of Attorney's Act 1882, in cases of powers of attorney executed on or after the 1st May 1882, where he has acted in good faith under such power, and has made payments or done acts subsequently to the revocation of the power if the revocation was unknown to him.[4] But the protection given by this Act is expressly declared not to effect any right against the payee of any person interested in any money so paid, and declares such person to have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

Effect of notice being unknown to third parties.—The case of *Trueman* v. *Loder*[5] is an example of this rule that notice has no effect against third parties until it is known to them. There Loder a merchant residing in Russia carried on business in London through Higginbotham who had no capital or credit, and was

[1] L. R. 4 Ex D., 216, (234).

[2] I. L. R. 8 Calc, 678 and see Ind. Contr. Act, s. 264.

[3] Ind Contr. Act, s. 208. *Harrison's Case*, 12 Mod, 346 *Hazard* v. *Treadwell*, 1 Str., 506.

[4] Act VII of 1882, s. 3.

[5] 11 A. & E., 589.

universally known to represent Loder, though Higginbotham's name was always used. Loder gave notice to Higginbotham that he should cease to employ him; after which Higginbotham contracted with one Trueman to sell him some tallow and Higginbotham's name was used as before. Higginbotham intended to make the contract on his own account; but Trueman was not aware of this, and believed that Higginbotham was representing Loder as usual; the contract was made by a broker acting for both parties, who signed, bought and sold notes "bought for Trueman" and "sold for Higginbotham to my principals;" Higginbotham died before delivery, and Trueman brought an action against Loder for such non-delivery. Lord Denman held that Loder was liable for non-delivery of the tallow, Trueman having no notice that the name of Higginbotham ceased to mean that of Loder. So where a wife was recognized by her husband as his agent for a number of years, by his paying her bills and amongst others, bills due to the plaintiff The wife went to England for three years and on her return recommenced dealing with plaintiff, held that as there had been a recognized agency before her departure to England, the agency would continue until the plaintiff had notice of it's determination.[1]

Revocation of agency for a period.—The principal cannot, however, where there is an express or implied contract between him and his agent that the agency shall be continued for a fixed period, terminate the agency without making to his agent compensation for such revocation.[2] Some question may arise as to whether the parties have made a definite agreement for a fixed period or not. It may be that they are not both bound for the same period. And it has been decided that the appointment of an agent for a given period, does not of itself amount to an agreement that he should be permitted to act as agent during that period.[3]

Where the agency is for a fixed period.—Where the agency is for a fixed period and is unexpired, and where the principal, without revoking his authority, puts it out of his power to continue the agency by disposing of his business, in such cases, if there is no term express or implied in the contract between the parties that the business is to be carried on during the period named, the agent will be unable to recover compensation from his principal Such was the case in *Rhodes* v. *Forewood*.[4] There, Forewood, a broker, and Rhodes the owner of a colliery agreed in consideration of the services and payments to be mutually

[1] *Samchand Doss* v. *Cox.*, Cor 82.

[2] Ind. Cont. Act, s. 205.

[3] *In re English and Scottish Marine Insurance Co.*, L R 5 Ch 637. *Churchward* v. *The Queen*, L R. 1 Q. B, 173. *Aspdin* v. *Aspdin*, 5 Q B, 671, *Dunn* v. *Sayles*, 5 Q B, 685; but as to those last two cases see *Emmens* v *Elderton*, 13 C B 495, (510); 6 C. B., 160. *Burton* v *Gt. Northern Ry. Co.*, 9 Ex, 507.

[4] L R. 1 App Cas, 256.

rendered, that for seven years or as long as Rhodes should continue to carry on business at Liverpool, Forewood should be the sole agent at Liverpool for the sale of Rhodes's coal, and that Rhodes would not employ any other agent at Liverpool for that purpose. There were stipulations in the agreement that Rhodes should have the entire control over the prices for which, and the credit at which, the coals were to be sold; and that if Forewood could not sell a certain amount per year, or Rhodes could not supply a certain amount per year, either party might, on notice, put an end to the agreement At the end of four years Rhodes sold the colliery itself. In an action for damages for breach of the agreement thereby occasioned, held that the action was not maintainable, for that the agreement did not bind the colliery owner to keep his colliery, or to do more than employ the agent in the sale of such coals as he sent to Liverpool It was in this case contended that the contract contained an implied contract under which Rhodes was bound to send coal to Liverpool, and that he had disabled himself from performing that implied contract by selling the colliery out of which the coal might have come. Lord Cairns decided that he was unable to find any implied contract that the colliery owner would not sell his colliery entire, pointing out that there were several risks unprovided for by the contract, *viz*, that Rhodes might have sold his coal at places other than Liverpool, that the coal might have been sent to Liverpool, but the principal might have taken a view with regard to the price to be obtained for it which would have led him to place limits upon the coal such as to prevent the agent selling any of it in one particular year, and the agents might have been left in that year without any commission whatever, although having coal in stock, because the principal might have thought it expedient to hold the coal and wait for better prices; that the colliery owner might, by reason of difficulties arising with workmen, or otherwise, have chosen to close his colliery for a year or for several years, and to wait for better times; could the agents have complained of that? His Lordship pointed out, if all that was in the power of the colliery owner (for it could not be concluded that there was any provision in the contract against those risks) why was it to be assumed, with regard to the risk of the colliery owner not selling his coal elsewhere piecemeal, but selling the colliery itself to a purchaser, that there is an implied undertaking against that one risk, although it was admitted that there was no undertaking at all against any of the other risks. Lord Chelmsford considered that an intention not in the minds of the parties, could not be implied to have existed, and agreed that no such implied contract existed, Lord Hatherley and Lord Penzance both agreed that there was no such implied contract, and Lord Penzance referred to the case of *McIntyre* v. *Belcher*[1] a case where a medical man had bought a business and was to pay a portion of

[1] 11 C. B., N. S., 654, 32 L. J., C. P., 254

the profits that he should make from it to the vendor; and after buying the business he ceased to carry it on, and the seller lost a portion of what was practically the agreed price for which the business was sold; in which case the Court held that there was an implied obligation on the part of the purchaser that he would go on working at the business in order to make those profits. But his Lordship distinguished the case from the one before the House by pointing out that in *McIntyre* v. *Belcher* the bargain was for a definite payment out of the profits to be earned as part of the price of the thing that had been originally sold to him, whereas in the case before the House, the bargain was for an agency to be carried on for the material benefit of Forewood and Rhodes, the selling price of the coal being at the sole discretion of Rhodes; His Lordship then remarked that although that case did not apply, the principle contained in it very well illustrated the great difference there was between the case before him and all cases in which, in the words of Lord Chief Justice Cockburn in *Stirling* v. *Maitland*[1] the Court has held "that the defendant is bound to continue a state of things which is necessary to the carrying out of his own contract." Lord O'Hagan considered that the admission of Rhodes's right to sell the entire produce of his colliery in other markets, or to cease the working of it, or to put upon his coal prices making it unsaleable, practically involved also the admission of his right to dispose of the colliery itself.

Compensation for revocation of agency for fixed period—The claim for compensation for the revocation of an agency for a fixed period, of course depends on the terms and nature of the contract establishing the agency, and the acts and conduct of the parties thereto. As to this, and the form the claim should take, Melville J., in *Vishnucharya* v. *Ramchandra*[2] says, "The remedy for the improper revocation of an agency lies, under ordinary circumstances, in an action for damages for breach of contract; by s. 205 of the Contract Act, the principal is bound to compensate the agent, whenever there is an express or implied contract that the agency shall be continued for any period of time; this would probably always be the case when a valuable consideration has been given by the agent; an action for damages might probably have been maintained, in the present case, whether a valuable consideration was given by the plaintiff (the agent) or not. In such an action he would have been bound to claim a lump sum as compensation, and it would not be competent to him to break up his damages into annual instalments, and to bring periodical actions for their recovery." In the case cited the agent had brought his suit as for specific performance of the terms of the contract of agency which related to the agent's pay and remuneration, and had claimed payment for services rendered both before and after the authority had been revoked, the latter claim was based upon the

[1] 5 B & S, 840. [2] I L R. 5 Bom, 256

following words of the contract, "If I get my work done by others, I will, without making any reduction in your pay, permanently continue to give you, generation after generation, the sum of money (Rs. 42) now fixed in writing from out of the whole amount of my share." Melville J., as to this, said, "it cannot be doubted that such an agreement to pay a perpetual annuity, whether any services were rendered by the annuitant or not, would be *nudum pactum*, unless there were valuable consideration for the promise, if the allegation (of valuable consideration being given) were established, the plaintiff would be entitled to recover his remuneration whether he performed services or not, and it would not be necessary to determine the length of time for which his services were rendered;" the case was remanded to the lower Court to ascertain whether valuable consideration had passed. That a suit for damages is the proper remedy for the agent is also shown by the remarks of Sarjent J., in *Nusserwanji Merwanji Pandey* v. *Gordon*.[1]

Renunciation by agent.—The agency is also determined by the agent renouncing the business of the agency, and this may be done before[2] or even after he has accepted and in part executed his commission; but such last renunciation must be made under the same terms as to notice or damages, or if a renunciation of an agency for a fixed period, under the same terms as to compensation, as have been referred to above in the case of a revocation of authority by a principal.[3] And in all probability an agent abandoning the agency would be considered as having renounced without notice; but generally it would probably be not so if he abandoned when called upon to do anything which was unlawful.

Completion of the business of the agency—The authority may also be terminated by the business of the agency being completed.[4] Thus, where a principal employs an agent to sell a particular batch of goods, or a house, and the agent carries out such sales, and hands over the proceeds to his employer, the business of the agency would be completed: or, again, where a client employs an attorney to act for him in a particular case, and the case is carried through to final judgment, the attorney's power is at an end; or if a man should sell goods as a broker, the moment the sale is complete he becomes *functus officio*.[5] But whether termination of the agency by eflux of time is intended to fall under this heading, is not clear from the Act. The agency in such cases would die a natural death, and as a consequence the business of the agency would,

[1] I. L. R. 6 Bom. 266, (283).

[2] *Williams* v. *Everett*, 14 East, 582.

[3] Ind. Contr. Act, ss. 201, 205, 206, 207, see *Elsee* v. *Gatward*, 5 T. R., 143, 3 Black Comm, 157.

[4] Ind Contr. Act, s 201.

[5] *Blackburn* v. *Scholes*, 2 Camp. 341, (343).

it is assumed, cease, but it does not follow that the work of the agency has been carried out to an end; there may be still something to be done, although the period fixed upon may have come to an end. Instances may arise in cases where one has appointed another his agent during such time as he may be away from India, and such an agency would, irrespective of the work being carried out, be terminated by the return of the principal; or where there is a particular usage in the particular trade in which the agent is employed, to the effect that an authority to buy or sell shall continue for a limited time only, the mere lapse of time has been held to operate as a revocation of the authority.[1] And as no man can become agent of another, without that other's will, where the will expressly declares that the one man is to become the agent of that other for a fixed period only, it appears to be clear that upon the expiry of that period, the agency must expire.

By the death of the principal—The death of the principal is also another means by which the agency is put an end to.[2] In such case there is no one for the agent to represent. Again an authority executed by another presupposes the giver, at the time of the execution of the authority, to be able to do himself the act delegated to his agent; for the agent is put into the place and stead of the principal, and is to act in his name.[3] Therefore unless there is something in the nature of the authority to keep it alive, it will naturally cease. But nevertheless although the general rule is that the death of the principal terminates the agency, it will not do so, as against the agent until such death is known to him, nor as against third parties until it is known to them.[4] But where, as has been above stated, there is something in the nature of the authority to keep it alive, it will not nevertheless terminate by the principal's death, as for instance, where the authority given to the agent is coupled with an interest in the subject of the business of the agency.[5] This is in accordance with the law of England,[6] and although it has been said by a learned text-writer[7] that s. 202 only applies to voluntary revocations, yet it appears that it was not the intention of the framers of the Act to make this distinction. Section 201, the marginal note of which is "termination of the agency" deals with revocation, remuneration and other terminations of the agency, and gives the general rule on the

[1] *Dickenson* v. *Lilwall*, 4 Camp., 279

[2] Ind. Contr. Act, s 201.

[3] Combe's case, 9 Co 76, 77, Comyn's Digest, "Authority F"

[4] Ind Contr. Act, s 208. Act VII of 1882, s 3

[5] Ind Contr Act, s. 202

[6] *The King* v. *Corporation of Bedford Level*, 6 East, 356 and Story on Ag., 489, see also 2 Kent's Comm, Lect 41, 645-646, see however the distinction drawn in *Lepard* v. *Vernon*, 2 Ves. & B., 51.

[7] Macrae on Contr., p 157.

subject, subject to the exceptions laid down in the sections which follow it referring to the "termination of the agency" Section 203 no doubt deals with the revocation of an agency, and contains a direct reference to s. 202; and in support of Mr. Macrae's view, there is the fact that s 202 does *not* run "cannot in the absence of an express contract be terminated, *either by the principal's voluntary power to revoke, or by his death, or insanity*, to the prejudice of such interest." But on the other hand both sections 201 and 202 deal with the "termination of the agency;" and therefore the words of s. 202 are broad enough to include a termination of the agency by death. It appears moreover from the illustrations to section 202, that it was intended that the section should deal with the case of a termination by death; and it would therefore appear that the words italicized above were carelessly omitted from s. 202. It is therefore submitted that the law in this country is the same as it is in England on this point; moreover where the agent has an interest in the authority, he is no longer an agent as to such interest, but a principal acting in his own name in pursuance of a power limiting his interest; and the reason on which the general rule is founded, therefore ceases. The words "has an interest in the subject matter of the agency," make it, I think, clear that there must be an interest in the subject matter itself, and not merely in the execution of the power. A warrant of attorney to confess judgment has been held in England not to be in the sense of the law, a power coupled with an interest,[1] and though when it has been given by two persons, it is revoked by the death of one of them;[2] yet when given to two persons, it is not revoked by the death of one of them[3]

Partnership terminated by death—The rule of law with regard to the death of a partner, is that such death terminates the partnership,[4] but this also would be, where one partner is acting as the agent of the firm, subject to the rule as to notice laid down by s 208 of the Contract Act, or at least as far as old customers of the firm are concerned;[5] where however the agency is terminated by the death of the principal, the agent is nevertheless to take on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.[6] Thus where the subject of the agency between the agent and his late principal, is the sale by the latter of horses entrusted to him for the purpose, the agent on notice of the death of his principal would be bound to feed and stable such horses until,

[1] *Oades* v. *Woodward*, 1 Salk., 87 *Fuller* v *Jocelyn*, 2 Str, 882.

[2] *Gee* v *Lane*, 15 East, 592.

[3] *Todd* v. *Todd*, 1 Wils., 312.

[4] Ind. Contr. Act, s. 253, (cl. 10).

[5] *Chunder Churn Dutt* v. *Eduljee Cowasjee Bynee*, I. L R 8 Calc., 678. See also Ind. Contr. Act, s. 264.

[6] Ind. Contr. Act, s. 209

at all events, the representatives of the deceased could reasonably take the horses out of his charge; or if the business of the agency is the sale of ripe fruit, in such case the agent would be bound to take steps to effect an immediate sale thereof in the interest of his late principal, but not with the object of gain for himself.

By death of agent.—It may also be terminated by the death of the agent.[1] The work of the agency cannot be carried on by the agent's representatives, as he is supposed to have been employed in the first instance on the ground of the principal's special confidence in him, which confidence cannot be supposed to extend to his representatives as well as himself.[2] But although the agency does not come into the hands of the late agent's representatives, yet, if the agent has not accounted to his principal before his death, a fresh right to an account will accrue against his representatives.[3]

Exception.—But the death of the agent will not terminate the agency, where the agent's authority is coupled with an interest, (unless there is an express contract to that effect),[4] and such interest may be exercised by the agent's representatives or assigns.

Death of one of two joint agents.—Where the authority is joint, the agency would be terminated, but where the agency is joint and several, and has been entrusted to two or more private agents, the death of one presumably will not terminate the agency; thus the receipt of one joint factor is the receipt of the others, so that should one die, the other must account for the whole,[5] even though it appears that the business was transacted solely by the one who died.[6] And where goods are consigned to joint factors for sale, and the sale is carried out by one, that one will be liable to the principal for the proceeds of the sale.[7]

By unsoundness of mind.—A further mode in which the agency may be terminated, is by the principal or the agent becoming of unsound mind.[8] First as regards unsoundness of mind of the principal; the very fact that the agent exercises his authority, implies the existence of a principal who is competent to perform the work of the agency himself; for it is to be remembered that the act of the agent is the act of the principal, though carried out through the agent. And if therefore it should happen that the principal becomes unable to act, then the very thing which gives existence to the agent's authority to act is wanting;

[1] Ind. Contr Act, s. 201

[2] *Pothier de Mandat*, note 101.

[3] *Lawless* v *Calcutta Landing and Shipping Co*, I. L. R 7 Calc, 627

[4] Ind Contr. Act, s. 202

[5] Viners Abr. Account, K. 2. *Holtscomb* v. *Rivers*, 1 Ch Cas., 127.

[6] *Godfrey* v. *Saunders*, 3 Wils., 79.

[7] *Wells* v. *Rons*, 7 Taunt, 403.

[8] Ind. Contr Act, s. 201.

and the relationship between them must therefore cease, or at all events be suspended. But the agent still has a duty to perform after the termination of the agency, *viz.*, to take all reasonable steps for the protection and presentation of the interests entrusted to him,[1] this is a similar duty to that which devolves on him in the case of the termination of the agency by the death of the principal and need not therefore be referred to again. Next as to unsoundness of mind of the agent, this also terminates the authority,[2] for it is supposed that his appointment has been made on account of his skill and ability and intelligence, and any loss of ability or intelligence would render the proper performance of the business of the agency impossible. The general rule that unsoundness of mind of either party to the agency, terminates the agency, is, however, subject to this exception, that the authority cannot be terminated to the prejudice of the agent where he has an interest in the subject matter of the agency;[4] for having an interest he has a right to exercise the authority in his own name, or through his representatives.

Knowledge of unsoundness of mind.—But the termination of the authority of the agent does not so far as regards the agent take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them.[3]

Lunacy so found by inquisition.—It has been said by Mr. Kent in his commentaries[5] that the lunacy to affect the agency, must be established by inquisition, for neither the agent, nor third persons dealing with him under the power, have any certain evidence short of finding by inquisition of the state of mind of the principal. This, however, I do not think, is necessarily the case in this country.

Knowledge or notice of unsoundness of mind.—As regards the question of notice of unsoundness of mind being necessary before the authority can be terminated, the case of *Drew* v. *Nunn*,[6] may be referred to. In that case the plaintiff was a tradesman, with whom the defendant had given his wife authority to deal, having held her out as his agent and as entitled to pledge his credit. Subsequently the defendant became insane, and whilst the malady lasted his wife ordered goods from the plaintiff, who accordingly supplied them; at the time of so supplying the goods, the plaintiff was unaware that the defendant was insane; the defendant afterwards recovered his sanity, and then refused to pay for the goods supplied. In an action brought against him for their value, he set up insanity—held, that although insanity terminated the agency, yet it was not so when the authority is given before the lunacy and of which third persons dealing with the agent had no notice. On this point of notice,

[1] Ind. Contr. Act, s 209.
[2] Ind. Contr Act, s. 201.
[3] Ind. Contr. Act, s. 208. Act VII of 1882, s. 3.
[4] Ind Contr. Act, s. 202.
[5] Vol. II, 643
[6] L. R 4 Q. B D, 661.

Brett L. J said :—"It seems to me that an agent is liable to be sued by a third person, if he assumes to act on his principal's behalf after he has had knowledge of his principal's incompetency to act ..... As between the defendant and his wife, the agency expired upon his becoming to her knowledge insane; but it seems to me that the person dealing with the agent without knowledge of the principal's insanity has a right to enter into a contract with him, and the principal, although a lunatic, is bound so that he cannot repudiate the contract assumed to be made upon his behalf. It is difficult to assign the ground upon which the doctrine, which, however, appears to be the true principle, exists ..... but it has been said that the right depends upon representations made by the principal and entitling third persons to act upon them, until they hear that these representations are withdrawn..... The defendant became insane and was unable to withdraw his authority .... . he may be innocent, but the plaintiff who dealt with the wife, *bonâ fide*, is also innocent, and where one of two persons both innocent must suffer by the wrongful act of a third person, that person making the representation, which as between the two innocent was the original cause of the mischief, must be the sufferer and must bear the loss . .... the defendant, while he was insane, made representations to the plaintiff, upon which he was entitled to act until he had notice of the defendant's insanity, and he had no notice of the insanity until after he had supplied the goods." Bramwell L. J., said, "It must be taken that the defendant told the plaintiff that his wife had authority to bind him; when that authority had been given, it continued to exist, so far as the plaintiff was concerned, until it was revoked, and until he received notice of that revocation. It may be urged that this doctrine does not extend to insanity, which is not an intentional revocation, but I think that insanity forms no exception to the general law as to principal and agent ..... it would be productive of mischievous consequences, if insanity annulled every representation made by the person afflicted with it without any notice being given of his malady." Cotton C. J., based his decision on the ground that "the defendant by holding out his wife as his agent, entered into a contract with the plaintiff that she had authority to act on his behalf, and that until the plaintiff had notice that this authority was revoked, he was entitled to act upon the defendant's representation."

By insolvency of principal.—The authority is also terminated by the principal being adjudicated an insolvent; and this is so, as an order adjudicating a person insolvent vests in the official assignee all the insolvent's real and personal effects (save certain necessaries to the value of Rs. 300) and all other properties which may pass under the insolvency from the date of the filing of the petition in the Insolvent Court,[1] from which date the insolvent ceases to

[1] Ind. Insol. Act, s 7.

have any control or disposing power over his properties ;[1] as therefore the principal is incompetent after his insolvency to exercise any power over the subject matter of the agency, he cannot authorize another to do so, since this would be to allow the derivative authority to be stronger and more extensive than the original and principal authority, which, it is said, cannot be.[2] It is however more strictly correct to say that the insolvency of the principal terminates the authority of his agent touching any rights of property of which he is divested by the insolvency. The agency, however, is not terminated, as regards the agent until the fact of the principal's insolvency becomes known to the agent, and as regards third persons until it is known to them.[3] But acts done by the agent in the business of the agency before he has notice of the insolvency, will not be affected by the insolvency even though the principal be adjudicated an insolvent previously to the act done by the agent. Thus where an agent was sent over to Paris duly authorized to compromise a debt, and being so authorized, compromised the debt; but previous to the date on which the compromise was actually entered into, the person's authorizing the transaction became bankrupt, which fact was unknown to the partner compromising; it was contended that such bankruptcy determined the authority. Lord Chancellor Eldon in delivering judgment said "There was I remember a case before Lord Kenyon where a power of attorney was sent out to India, and the attorney, after the death of the principal, which happened in the country, acted under that power without notice of his death. Lord Kenyon, under these circumstances, supported the acts of the attorney. I think that is an authority upon which I may decide the present case, if the agent had no notice of the bankruptcy."[4]

Notice of Insolvency.—As to what is sufficient notice to the agent or third parties, it may be presumed that the notice directed, under s. 82 of the Indian Insolvent Act, to be published in the Gazettes of the respective Presidencies within which the Insolvent Courts are held, would be sufficient; or if the agent or third persons were aware of the order of adjudication before this, then such knowledge would be sufficient. As to this question, Sir G Mellish L. J. says, "It appears to us that if a person is proved to know facts which constitute an act of bankruptcy, or is proved to know facts from which a Court or a jury, or any impartial person, would naturally and properly infer that the act of bankruptcy had been committed, he ought to be held to have had notice that an act of bankruptcy had been committed, and that the Court ought not to enter upon the enquiry, whether he did in his own mind believe that an act of bank-

[1] *Soonder Dey* v *Shoshi Mohan Pal*, 11 C L R, 389. *Sadeklin* v *Spiers*, I L. R 3 Bom., 437.

[2] *Parker* v. *Smith*, 16 East, 382, (386), per Lord Ellenborough.

[3] Ind Contr Act, s. 208.

[4] *Ex parte M. Donnell*, Buck, 399.

ruptcy had been committed, or whether he did in his own mind draw the inference that the bankrupt intended to defeat or delay his creditors. A person may be proved to have had notice that an act of bankruptcy has been committed, either by proof that he had received formal notice that an act of bankruptcy has been committed, or by proof that he knew facts which were sufficient to inform him that an act of bankruptcy had been committed. If he is proved to have received a formal notice he is not allowed to escape from the effect of having had notice by saying that he had not read it when he ought to have read it, or that he did not believe it when he had read it; and we think if he is proved to have known facts which were sufficient to have informed him that an act of bankruptcy had been committed, he cannot be allowed to escape from the effect of having had notice by saying that he did not draw the natural inference from the facts."[1] In this country the agency is only determined, as has been seen, on the principal being adjudicated an insolvent; and therefore the notice in this country is not one of the act of insolvency (or as in England on the act of bankruptcy)[2] but of the adjudication, still these remarks of Sir G. Mellish are useful as showing that neglect on the part of the agent or third parties to make proper inferences from their knowledge, will not effect the fact that notice has been received.

Agency with interest not terminated by principal's insolvency.—The exception to the rule that the agency is terminated by the principal's being adjudicated an insolvent, is similar to the exception allowed in the case of the like termination of the agency by the principal's death, and unsoundness of mind, namely, that where the agent has an interest in the subject matter of the agency, the authority cannot be terminated to the prejudice of that interest.[3] A further exception is that where the agency is created for the sole purpose of doing formal acts which the principal would have been bound to do irrespective of his insolvency, the insolvency of the principal would not revoke such an agency.[4]

Agent's insolvency.—Although under English law the insolvency or rather bankruptcy, of the agent is a determination of the agency, save in cases where the authority is merely to do formal acts which pass no interest, the performance of which is incumbent on the agent,[5] this does not appear to be the law in this country; there is nothing in any enactment passed by the

[1] *Ex-parte Snowball in re Douglas*, L. R. 7 Ch App., 534, (549).

[2] *Minnett* v. *Forrester*, 4 Taunt, 541. *Alley* v *Hotson*, 4 Camp, 325

[3] Ind. Contr. Act, s. 200. Bell's Comm, Bk. III, Pt I, Ch III *Elliot* v *Turquand*, L. R. 7 App. Cas., 79.

[4] *Dickson* v. *Ewart*, 3 Mer, 322.

[5] Evans on Pr. and Ag., p. 106 *Robson* v *Kemp*, 4 Esp, 233 *Alley* v *Hotson*, 4 Camp., 325

legislature laying down that an agency is thus terminated. It appears moreover that this derogation from the law of England, has been intentional, for it cannot be supposed that the legislature were at the time of passing the Contract Act unaware of the remarks of Levinge J., in *Pole* v. *Gordon*.[1] In that case Pole had entered into a contract through Tulloh and Company whereby the defendants, the representatives of the firm of Carr, Tagore and Company, the owners of a silk factory at Jessore, were to supply the plaintiff with silk for two years. The contract on the face of it purported to be made on behalf of Tulloh and Company's London correspondents, but the name of the plaintiff as principal was not disclosed. In accordance with a term of the contract, under which the plaintiffs were acting, they advanced the sum of Rs. 50,000 to the defendants to be secured by a mortgage of the stock and works of the silk factory at Jessore for the period of the contract; this was done. The silk was to be delivered in Calcutta to Tulloh and Company; the plaintiffs kept Tulloh and Company from time to time in funds to pay for the silk on delivery. The defendants on the 9th May 1846, delivered to Tulloh and Company 16 bales of silk and took for that delivery Tulloh and Company's bill for Rs. 18,024 payable 10 days after date. This bill the defendants discounted, but on the 20th May, Tulloh and Company became insolvents and the amount was lost to the defendants. The plaintiffs sought to foreclose their mortgage for Rs. 50,000 alleging that the insolvency of Tulloh and Company had put an end to the contract. The defence raised was, that the insolvency had no such effect, and that consequently the contract being for a fixed period, the mortgage could not be foreclosed or recalled until the expiry of the two years for which the contract ran. Levinge J. said, "Admitting for the sake of argument *that the bankruptcy of Tulloh and Company terminated their powers to act as agents*, it by no means followed, that the contract between the plaintiffs and the defendants must fall to the ground; I do not see why the death or bankruptcy of an agent, is to dissolve a contract; no doubt, he continued, there may be cases, in which the performance of a contract may become impossible by the happening of some event, and then the performance will be excused; but the impossibility must be very clearly established, and I have been unable to find any case, showing that the death of an agent, much less his bankruptcy, will render the continuance of a contract impossible. I apprehend that there are abundance of reasons to be given in this particular case, why the contract did not become incapable of being performed, and therefore was not extinguished. It was perfectly competent to the plaintiffs to have appointed another agent ..... Why are the defendants to suffer and have the contract terminated, because the plaintiffs did not stipulate for a

[1] 2 Hyde, 281, on App *ibid*, 289.

successor, or neglect to provide one? I am not to be understood as saying, that the powers of Tulloh and Company ceased for every purpose as agents under the contract, by reason of their bankruptcy. There are many acts and duties which it has been held, an agent may perform under his appointment, subsequent to his bankruptcy. If Tulloh and Company were principals, and not agents, the fact of their being adjudicated bankrupts, would not have put an end to the contract how then can it be said, that being merely agents, a *fiat* in bankruptcy annulled the contract. If by the bankruptcy they became incapable of exercising any of the functions required by the contract, which I do not admit, the defendants are not to be cast adrift, and the advances called in, simply because the plaintiffs did not provide for that contingency." On appeal,[1] this judgment was affirmed by Norman C. J. and Phear J., and although the learned Chief Justice agreed with Mr. Justice Levinge as to his decision on the question of the contract not being terminated on the bankruptcy of Tulloh and Company, yet both learned Judges agreed in dismissing the suit on other grounds. The case is no doubt only an authority on the effect of the insolvency of an agent upon contracts made by him with third parties on behalf of an undisclosed principal; but the remarks of Levinge J., when he said, "I am not to be understood as saying that the powers of Tulloh and Company ceased for every purpose as agents under the contract by reason of their bankruptcy" point to the fact that the learned Judge considered that as a general rule bankruptcy of an agent puts an end to the agency; and the subsequent remarks "There are many acts and duties, which it has been held, an agent may perform under his appointment, subsequent to his bankruptcy" again point to the general rule and its exception as laid down in England, *viz.*, that the bankruptcy of an agent is a determination of the agency, except in cases where the authority is merely to do some formal act, which passes no interest, the performance of which is incumbent on the agent. However this may be, no mention is made in the Indian Contract Act of a termination of the subject matter of the agency by the insolvency of the agent; a probable presumption is, that the legislature when framing the Indian Contract Act, were cognizant of these *dicta* of Levinge J., and expressly framed the sections on this subject having regard to this case.

Agent's discharge under Insolvent Act.—Where an agent is adjudicated an insolvent, a question may arise as to under what circumstances he is entitled to his final discharge; for as regards the attainment of discharge there is under the Insolvent Act a difference between a person who is a trader and one who is a non-trader. It has been held that the agent of a Company or private individual whose business consists in procuring and receiving parcels for transmission by his employers, or who by his personal exertions obtains passengers for their

[1] 2 Hyde, 286

dâk, although he may be entrusted with the receipt or price of carriage, and is paid by commission, is not a broker or trader within the meaning of the Insolvent Act.[1]

Effect of insolvency of agent on right of principal.—Notwithstanding that an agent's insolvency presumably does not terminate the agency, it may effect the rights of his principal, unless the agency is clearly established, for it may even happen that the principal has property in the possession of his agent at the time of the latter's insolvency;—for "property in the order and disposition of an insolvent is deemed to be, under certain circumstances, his property and divisible amongst his creditors. Section 23 of the Indian Insolvent Act enacts, 'that if any Insolvent, shall, at the time of filing his petition, or at the time of filing the petition on which an adjudication of insolvency shall be made, by the consent and permission of the true owner thereof, have in his possession order or disposition any goods, or chattels, whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent, so as to become vested in the Official Assignee of the Court under the vesting order; provided that no assignment or transfer of any ship or vessel or any share thereof, made as a security for any defendant either by way of mortgage or assignment duly registered according to the provisions in force or hereafter to be passed for the registering of British vessels, shall be invalidated or affected by reason of such possession, order or disposition. The object of this is, to protect the general creditors of an insolvent against the consequences of false credit which might be acquired by his being suffered to have the possession, power and disposition of property as his own, which does not really belong to him.[2] The principle is this,—where goods are in the order and disposition of any person under such circumstances as to enable him by means of them to obtain false credit, then the owner of the goods who has permitted him to obtain false credit, must suffer the penalty of losing such goods for the benefit of those who have given the credit.[3] The purport of the section has been described by Kelly C. B., when deciding a case under s. 125 of 12 and 13 Vic. c. 106, which is worded similarly to s. 23 of the Indian Act, "The language of the Statute seems to point to this state of things, in which the owner of the property allows the property to remain in the possession of another person, so that the other person appears to be the owner, although not himself the true owner. But it also implies a power in the true owner to secure his rights, to resume possession of the property of which he is the owner, to take it out of the possession of the person to whom he may have entrusted it, and which therefore shows that he is the true owner, and the other person only the apparent owner." Willes J., said "that

[1] *In re Campbell*, 2 Hyde, 177.

[2] Millett and Clarke's Insolv., p. 35.

[3] *In the matter of Marshall*, I. L. R. 7 Calc., 421.

the bankrupt must have the *sole* possession, order or disposition as owner or the section would not apply "[1] It was in that case held that a dormant partner was not within the section. With reference to the construction of section 23, as regards partners, who are each general agents of the firm to carry on its business, it may be stated thus, if the possession by one partner of the goods of the firm is justifiable, if the circumstances are such as to show that his possession is for purposes strictly connected with the partnership, then the order and dispossession section will not apply; for the goods are not in his sole possession, order and disposition; his actual possession is on behalf of himself and his joint owners. Thus where members of the firm of A and Company mortgaged the live and dead stock, chattels and effects belonging to the firm to B, the mortgage deed stipulating that as long as there was anything due on the mortgaged property, the mortgaged property should be treated as the property in the order and disposition of the mortgagee, and A and Company subsequently obtained further advances from B at a time when A was residing in England, the instrument of further charge being signed on his behalf by his attorney, C and D the two members of the firm of A and Company residing in Calcutta remained in possession of the mortgaged property, and subsequently became insolvent The Official Assignee entered into possession as did also B. Subsequently A, the remaining partner of the firm, returned to Calcutta, and filed his petition of insolvency. On the mortgagee by petition claiming to be paid his mortgage money in priority to other creditors; *held* that the goods and chattels of the firm which were covered by the mortgage and further charge, did not vest in the Official Assignee upon the insolvency of C and D.[2] Pontifex J., in delivering judgment said, "How can it be said that in the present case that the action of A in allowing these goods and chattels to remain in the actual possession of his two partners was unjustifiable, there is no evidence that he did not return, indeed during his absence he gave evidence of two emphatic acts of ownership by executing the further charges through his attorney"

Order and Disposition clause.—Where the fact of the relation of principal and agent is clearly established, there is no doubt that the order and disposition clause does not apply[3] Not to enter into too great length on this point, I may shortly add that "reputed ownership" is excluded by a *bonâ fide* demand of the goods by the true owner, or an attempt on the part of the true owner to secure possession, although not successful.[4] It is also excluded by notorious custom.[5]

[1] *Reynolds* v *Bowley*, L. R 2 Q B, 479.

[2] *In the matter of Morgan*, I. L R 6 Calc, 633 [807

[3] *Ex-parte Boden, re Wood*, 28 L T. N S., 174 *Ex-parte Buck, re Fawcus*, 34 L T N S,

[4] See *ex-parte Harris, in re Pulling*, L R. 8 Ch, 48; *ex-parte Ware, in re Courton*, L R 8 Ch., 144, *ex-parte Montague, in re O'Brien*, L. R 1 Ch D, 554.

[5] *Ex-parte Brooks, in re Forbes*, L R. 23 Ch D, 261. *Cracrow* v *Salter*, L R. 18 Ch D, 30. See, however, *Harris* v *Trueman*, L R. 9 Q B D, 264; L R 7 Q B D, 340

It is also in England excluded from applying where the property in the hands of the agent is trust property; and this was one of the grounds of the decision in *Harris* v. *Trueman*. There is, however, in England now statutory authority for this proposition.[1] Whereas the Indian Insolvent Act is silent on the subject. There are no reported decisions on the applicability of this rule to this country; but the question was raised, I think, in the insolvency of Messrs. Cowie and Company, although the decision does not deal with the point. There is, however, little doubt, but that this rule would be observed in the case of an agent who acting as trustee, is at the same time carrying on for others a general or special agency business.[2] The cases on this point, decided before the English Bankruptcy Act came into force, are numerous.[3] It has, however, been held in this country that the principle that a person who is under an obligation to convey property to another is, in a Court of Equity, a trustee of such property for the latter, does not apply in cases where the reputed ownership clause of the Insolvent Act is in question.[4]

Termination of authority of sub-agents.—Lastly with regard to the termination of the authority granted to a sub-agent, who, it must be remembered, is a person employed by, and acting under the control of, the original agent; such an authority terminates by the termination of the authority of the agent. For as the agent cannot after determination of his own power do any act personally so as to bind his principal, so neither can the sub-agent, acting in his stead, inasmuch as the source of his authority has ceased to exist. And for the purpose of deciding whether his authority is terminated the same rules, as have been referred to above when dealing with the termination of an agent's power, are applicable to the case of the termination of the powers of the sub-agent.[5]

Summary.—It has therefore been seen that an agency may be terminated by the act of the principal or agent, or by operation of law, in one or other of the following modes—

1. By the principal revoking his authority
2. By the agent renouncing the business of the agency
3. By the business of the agency being completed.
4. By either the principal or agent dying.
5. By either the principal or agent becoming of unsound mind
6. By the principal being adjudicated an insolvent

[1] Bankruptcy Act of 1869, s 3, sub-s. 5.

[2] See *In re Hallett's Estate*, L R 13 Ch. D, (707)

[3] *Boddington* v. *Castelli*, 1 El & Bl., 879; 17 Jur., 781, *Winch* v. *Keeley*, 1 T R, 619 *Carpenter* v *Marnell*, 3 B & P 40. *Gladston* v *Hadwan*, 1 M & S, 526 *Parnham* v. *Hurst*, 8 M. & W, 743.

[4] *Bhaian Mulji* v. *Kavasji Jasanala*, I. L. R 2 Bom., 542

[5] Ind. Contr. Act, s 210.

The above are the only modes laid down by the Legislature in this country. There are, however, other ways in which an agency can be terminated under English and American law, to which it may be well that attention should be drawn. I allude, firstly, to the termination of the agency by the insolvency of the agent (to which subject I have in previous pages drawn attention), and secondly, to termination by the extinction of the subject matter of the agency. Now "extinction of the subject matter" may take place by an act of God or by inevitable accident such as by fire, storm or flood, or by the Queen's enemies, or even by a foreseen event such as the coming of age of a ward who is under the charge of a guardian having power to deal with the ward's property, and whose power would therefore cease on the ward's attaining full age. These matters are not as I have said expressly provided for by the Legislature with regard to agency, but in cases where an act of God or inevitable accident has made the carrying out of the agency business impracticable, the contract of agency would itself become void under s. 56 of the Contract Act.

Revocation of Trusts—The Indian Trusts Act[1] of 1882 by s. 78 declares that a trust created by will may be revoked at the pleasure of a testator; that a trust otherwise created can be revoked only—

(*a*) where all the beneficiaries are competent to contract—by their consent;

(*b*) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust, or

(*c*) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust But no trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

[1] As to the places in India in which this Act is enforced, see s 1 of Act II of 1882, and page 52 *supra*.

LECTURE V.

NATURE AND EXTENT OF THE AUTHORITY.

Nature of authority—Express or implied—Extent of—Special, General, and Universal—Secret limitations—Apparent authority—Powers incidental to all authorities—I. Everything necessary to effect it—Rule of construction—Powers necessary, examples of—Land Agents. Naibs and Gomastas—Mookteahs—Other agents—Acknowledgment of debts—Directors—Statutory authority of certain agents—II. Everything justified by usage—Powers not incidental to those in written contract not introduced by custom—Knowledge of usage—Exception in cases of maritime insurance—*Robinson* v *Mollett* rules deduced from—When oral evidence of usage admissible—Usage how proved—Time bargains—III. Powers in an emergency—Examples—Ground on which masters of ships powers in necessity are based—Duty to communicate with employers on emergencies—Examples—Authorities incident to certain classes of agents—Partners—Bankers—Commercial partners—Kurta of joint family—Attorneys—Masters of ships—Commission Agents—Auctioneers—Brokers—Insurance brokers—Ships brokers—Part owners—Trustees—Husband and wife—Hindu wife—Karnavans—Agents of pre-emptor—Counsel—Pleaders—Factors—Insurance Agents—Government Agents.

The nature of the authority.—The authority is in it's nature either express or implied; It is said to be express, when it is spoken or written;[1] It is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing,[2] may be accounted as circumstances of the case.[3] It may be inferred from the acts and conduct of the principal, as from previous employment in similar acts;[4] from adoption of acts of a like kind;[5] from tacit consent or acquiescence;[6] or from the nature and circumstances of a particular act done by the principal.[7] In *Pickering* v. *Busk*, a principal having put goods into a broker's hands, was held bound by a sale made by the broker without authority, because the Court said, the agent could have them for no purpose but sale. The nature and extent of the powers vested in an agent are not so much a matter of law as a matter of fact to be decided in each case in which a question of agency arises.[8]

[1] Ind. Contr. Act, s 186.

[2] *Sutton* v. *Tatham*, 10 Ad. & El., 27.

[3] Ind. Contr. Act, s. 187.

[4] *Bunwaree Lall Sahoo* v. *Mohesh Chunder Sing*, Marsh. 544, *Naraines Koorwaree* v. *Joogul Kishore Roy*, 6 W. R., 309, Macdonnel on Master and Servant, p. 246.

[5] *Multani M. Chutumal* v. *Thaker S. Neranji*, 7 Bom. H. C, 39.

[6] *Wilson* v. *Tumman* 6 M. & G., 242; *Pickard* v. *Sears*, 6 Ad. & El. 469, (474).

[7] *Pickering* v. *Busk*, 15 East, 38. *Hazard* v. *Treadwell*, 1 Str. 506. *Barnasotti* v *Bowring*, 7 C. B. (N. S.) 851. *Rimel* v. *Sampayo*, 1 C. & P., 254.

[8] *Ram Buksh Lall* v. *Kishore Mohun Shaha*, 12 W. R., 130.

The extent of the authority.—In extent the authority is either special, general or universal. It is said to be special when it is limited to a particular act, such as to buy a house, execute or register a conveyance; it is said to be general when it is given to do all acts connected with a particular trade, business, or employment; and universal when it is given to do every act of every description that can by any possibility be done by the donor;[1] this latter power seldom occurs in practice and requires no comment. Lord Ellenborough has defined a general authority as, not importing an unqualified authority, but, as being one derived from a multitude of instances.[2]

Secret Limitations.—But whether the authority be special or general, as between the principal and the agent, the former is only bound by such acts of the latter as are within the authority given; but as between the principal and third parties where the power given is a general power, the principal will be bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess;[3] and no secret instruction, unknown to third persons dealing with the agent qualifying in any way the apparent authority will be of any avail to save him from such liability: But as between the principal and third parties where the authority given to the agent is a special one, if the agent exceeds the special authority given, the principal is not bound by his acts, *unless he has held him out as having a larger authority;* I have had some doubts, whether section 237 of the Contract Act, would warrant this exception last mentioned, but I think the proposition is fully borne out by the case of *Mackenzie, Lyall* v. *Moses*,[4] which is a direct decision on that section. This case will be found fully set out later on when dealing with the liability of the principal to third parties. It is true that the judgment of the Judge of the Small Cause Court referring that case to the High Court, appears, from the passages in Story and Kent which he has cited, to consider that even though the principal held out the special agent as having a larger authority, he would not be bound, yet the decision of the High Court does not go that length, and warrants, as, I have said this exception to the rule. The principle upon which this rule is based, being that where one of two innocent parties must suffer, by the fraud or negligence of a third party, it is he who enabled that person by giving him credit to commit the fraud who should be the sufferer.[5] It follows therefore from this that if the principal has not by acts or conduct

[1] *Doorga Churn* v. *Koonj Beharee Pandey*, 3 Agra H. C. 23, Levi's Com. Law, Ch. VI, s. 1.

[2] *Whitehead* v. *Tuckett*, 15 East 400, (408).

[3] Ind. Contr. Act, s. 237.

[4] *Mackenzie, Lyall & Co.* v. *Moses*, 22 W. R., 156. Ind. Contr. Act, s 237.

[5] *Fitzerbert* v. *Mathew*, 1 T. R., 12 (16) *per* Buller J. *Gordon* v. *James*, L. R, 30 Ch D., 249, *Sir Robert Wayland's Case*, 3 Salk., 233, *Bolton* v. *Hillersden*, 1 Lord Ray, 225, *Whitehead* v. *Tackett*, 15 East., 400.

induced third persons dealing with his agent to believe that the agent, whether special or general, has any authority other than that contained in or incidental to the power itself, or if the extent of the power is known to such third persons, then any person dealing with such agent would do so at his risk, if it should turn out that the agent has exceeded his power. And if such third person makes no enquiry into the extent of the agency whilst being aware that the person he is dealing with is an agent, he will be taken to know the limits of the agency.[1] Thus it is said that where an agent is clothed with ostensible authority, no private instructions prevent his acts within the scope of that authority from binding his principal. Where his authority depends, and is known, to those who deal with the agent, to depend, on a written mandate, it may be necessary to produce or account for the non-production of, that writing, in order to prove what was the scope of the agent's authority.[2] The principle on which a person, having clothed an agent with apparent authority, but restricted it by secret instructions, is bound (if the other party choses to hold him so) to one who, in ignorance of the restrictions, contracts through the agent on the faith of the agent having the authority he seems to have, is explained in *Freeman* v. *Cooke*,[3] there it is said, "The principal does not actually contract, but the person, who thought he did, has the option to preclude him from denying that he contracted, if the case be brought within the very accurate statement of the law made by Parke, B, namely, "if the person means his representation to be acted upon, and it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting the truth; and conduct by negligence or omission, where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect." Again as Lord Ellenborough points out in *Pickering* v. *Busk*,[4] "Strangers can only look to the acts of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his agents; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority; I cannot subscribe to the doctrine that a broker's engagements are necessarily, and in all cases limited to his actual authority; it is clear that he may bind the principal within the limits of the authority with which he has been apparently clothed with respect to the

[1] *Levy* v *Richardson*, W. N. (Eng.), (1889), 25.

[2] *National Bolivian Navigation Company* v. *Wilson*, L. R., 5 App. Cas., 209

[3] 2 Ex., 654, (663)

[4] 15 East, 38, (43)

subject matter, and there would be no safety in mercantile transactions if he could not."

Instances of apparent authorities.—In *Neeld* v. *Beauford*[1] one Wedge, the Duke of Beauford's agent, had a general authority to conduct the business of an Inclosure, to attend the meetings, and to represent the Duke upon those occasions. The Duke gave him particular instructions, limiting his authority as to one part of the business, which restricted him from exchanging a certain wood except for woodland; but he did not communicate his instructions or those limits to his authority either to the Inclosure Commissioner or to the other party, although he did so to the agent of the other party. The Commissioner allotted lands, which were not woodlands, for the Duke's wood, and the Lord Chancellor said, that if "the agent had acted inconsistently with the instructions which he received in that particular, being a general agent for the purposes of the Inclosure, he considered, so far as his acts went, they were binding upon the Duke." Lord Campbell said the Duke's agent was a general agent for the exchange "the secret limitation imposed by him on the authority of the agent uncommunicated to the other side goes for nothing." Lord Cottenham also said "Having given this general authority can he (the Duke) be heard to say that this authority was limited by private instruction of which those who dealt with the agent knew nothing." Similarly where a European firm employed an agent to make purchases of jute for them in the bazaar, upon orders which were in force for two days, and they imposed restrictions on their agent's authority to pledge their credit, which restrictions were not made known to those with whom the agent dealt. The agent paid for jute purchased by his own cheques, but gave receipts for the jute in the name of his principals. One of the vendors sued the European firm for jute supplied, held that the arrangement between the principal and agent as to credit not being known to the jute dealers generally or to the particular dealer suing, the firm could not cut down or prescribe the apparent general authority by secret limitations and restrictions of which the dealers had no knowledge.[2] So where A employed B to manage his business and to carry it on in the name of B and Company, the drawing and accepting bills of exchange being incidental to the carrying on of such business, but it was stipulated between them that B should not draw or accept bills. B accepted a bill in the name of B and Company, held that A was liable on the bill in the hands of an indorsee who took it without any knowledge of A and B or the business. Cockburn C. J., said, "The case falls within the well established principle that if a person employs another as an agent in a character which involves a particular author-

[1] 5 Jur., 1123; 9 Jur., 813, on appeal; 12 Cl. & F., 248, (273).

[2] *Grant Smith* v. *Juggobando Shaw*, 2 Hyde, 301

ity, he cannot by a secret reservation divest him of that authority" and Mellor J., said, "It would be very dangerous to hold that a person who allows an agent to act as principal in carrying on a business and invests him with apparent authority to enter into contracts incidental to it, could limit that authority by a secret limitation."[1] Further illustrations of this rule may be found in the cases of *Spink* v. *Moran*,[2] *Smith* v. *McGuire*.[3] And the rule has equal application to the case of partners.[4]

Extent of every authority.—Before entering into the subject of the powers which are incidental to every authority, it will be advisable to draw attention to the particular words of section 188 of the Indian Contract Act, which section deals with the extent of the authority of agents. It will be noted that although the section makes no express mention of the terms, "general" or "special" authority, the first paragraph of that section purports to define the extent of the authority of a *special* agent, and the second paragraph, the extent of the authority of a *general* agent. The authority given to a special agent, is said to include an authority, to do every lawful thing which is *necessary* in order to carry the special authority into effect Whereas the authority given to a general agent is said to include not only the last mentioned authority, but also one to act in accordance with the usage of trade. From the first paragraph therefore, it might be inferred that a special agent is not entitled to act according to the usages of trade; but this section must be read with s. 1 which enacts that nothing in the Act shall affect any usage or custom of trade or incident of any contract not inconsistent with the provisions of the Act. Moreover, irrespective of this section, it is submitted that the words of section 188 are sufficient to include a custom of trade. For if the words "to do everything necessary" in the first paragraph of section 188 are construed to include amongst other necessities a right to act according to the usage of trade, no difficulty will arise. This construction has already in England been put upon the word "necessity" in *Clough* v. *Bond*[5] by Lord Cottenham who in speaking of the nature of a loss incurred by a trustee, and remarking that a trustee is not liable for loss occasioned by an authorized investment, goes on to say "So when the loss arises from dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, *necessity*, which includes the regular course of business in administering the property, will in equity exonerate the personal representative." As to this remark, Jessel M. R., in *Speight* v. *Gaunt*,[6]

[1] *Edmunds* v. *Bushell*, L. R., 1 Q. B., 97
[2] 21 W. R., 161, 178.
[3] 3 H. & N., 554.
[4] *Gleadon* v. *Tinkler*, Holt N. P. Cas., 586. Lindley on Partnership pp. 168, 169 (5th ed.).
[5] 3 My. & Cr., 490, (497).
[6] L. R., 22 Ch. D., 797, (751), 745

says "The value of that statement of the law is that he (Lord Cottenham) says, 'necessity which includes the regular course of business in administering the property,' interpreting the word *as being nothing more and nothing less than the regular course of business.*" Having pointed out the peculiar wording of section 188, and taking it that no departure from the law of England on this point has been intended, it follows, that whatever be the nature or extent of the authority, it is always, where there is no intention to the contrary expressed, construed to include an authority to do:—

I. Every lawful thing necessary for the purpose of carrying it into effect [1]

II Every lawful thing justified by the various usages of trade.[1]

III. In an emergency, all such acts for the purpose of protecting the principal from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances.[2]

Instances of powers incidental to the authority I Everything necessary to effect the authority.—Thus a merchant residing in India empowered by a person residing in England to recover in India a debt due to the latter, may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same,[3] and when so authorized he may receive payment in any way he may think fit [4] So an authority given by endorsees to procure the discount of a note or bill includes an authority to warrant the bill [5] So a power to enter into, transact, complete, and execute all such negotiations, contracts or agreements, which might be deemed expedient to enter into for the purpose of obtaining a grant, demise, or lease of any mine or land, for the purchase of ore or the right to open, dig or work any mine, has been held to include a power to raise money on bills for the purpose of such transactions [6] And an authority to buy railway shares includes an authority to do all that is needful to complete the bargain [7] So where a partner gave his son power to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, and the son submitted the accounts of the firm to arbitration, held that he was authorized so to do.[8] So a power to an assignee of a business to take proceedings to enforce existing contracts, and otherwise to deal in respect thereof as he

[1] Ind Contr Act, s 188

[2] Ind Contr Act, s 189

[3] *Pickford* v *Ewington*, 4 Dowl., 453, see illustration to s 188.

[4] *Barker* v. *Greenwood*, 2 Y. & C., 414.

[5] *Fenn* v. *Harrison*, 4 T. & R, 177

[6] *Withington* v. *Herring*, 3 Moo. & P., 36.

[7] *Bayley* v *Wilkins*, 7 C B, 886

[8] *Henley* v. *Soper*, 8 B. & C., 16, (21).

should think proper, will authorize him to refer to arbitration all matters arising out of the contracts.[1] So an authority to act for another generally during absence, empowers the donee of the authority to instruct a solicitor to appear on behalf of the donor of the power to show cause against an adjudication of bankruptcy against him.[2] So a power to manage a mine authorizes the holder to incur debts for wages and goods necessary for carrying on the mining operations, but not to borrow money.[3] So when I constitute another to carry on my business of a shipbuilder, I thereby authorize that other to purchase materials and hire workmen for the purpose of carrying on my business. So also a general power to buy jute if the agent is not supplied with funds includes a power to buy on credit.[4] So also a power to manage a tea estate includes a power to order doors for the house of the manager of such estate.[5] So an agent empowered to carry on all suits on behalf of his principal and to do all necessary acts to that end, is authorized to agree to be bound by the opinion (*i. e.*, statement without oath) of a respectable person as to the genuineness of certain receipts filed by a defendant in a suit brought by the agent's principal.[6] Similarly a power to negotiate Government Securities authorizes the negotiation of such Securities by way of pledge.[7] So a power to take charge of the principal's interest in a particular place, and act as his representative, has been held to authorize the attorney to dismiss the Captain of one of the principal's ships.[8] So a gomasta of a mercantile firm has power to do all necessary acts for carrying on the business of the firm, and to authorize brokers to make contracts.[9] So where an agent employed to keep in repair houses belonging to his principal, and who was not supplied with funds for the purchase of the necessary materials, but who was accustomed, as was his predecessor, to purchase chunam from a certain person in the name and on the credit of the principal, purchased chunam on such credit, held that he had power so to do.[10] So in a partnership one partner has power to bind his co-partners for all acts necessary to, or usually done in the business of the partnership; except where it has been agreed between the partners that a restriction shall be placed on the power of any one of them, when no act done in contravention of such

[1] *Hancock* v. *Reid*, 2 L. M. & P., 584.

[2] *Frampton Ex-parte*, 1 DeG , F. & J., 263.

[3] *Ex-parte Chippendale, in re German Mining Company*, 4 DeG., M. & G , 19, (40).

[4] *Grant Smith* v. *Juggobundo Shaw*, 2 Hyde , 301, 129.

[5] *Koora* v *Robinson*, 2 Agra, H C , Misc , 2.

[6] *Rajender Chunder Newgie* v. *Mahomed Aynooddeen*, W. R., (1864), 143

[7] *Bank of Bengal* v. *Fagan*, 5 Moo., I. A., 27. *Alexander* v. *Gibson*, 2 Camp., 555. *Hellyea* v. *Hawke*, 5 Esp., 72 *Howard* v. *Stewart*, L. R., 2 C P., 148.

[8] *Berwick* v. *Horsfall*, 4 Jur., N. S., 615.

[9] *Gardine Skinner* v *Nathoram Bourke*, (O. C.), 43.

[10] *Narainee Koonwaree* v. *Joogul Krishna Roy*, 6 W. R., 309.

agreement shall bind the firm with respect to persons having notice of the restriction.[1] So a power to sell, transfer or mortgage a ship, includes a power to mortgage the freight and passage money, Erle J., said, "It is evident that the need of the ship may be such, that the voyage would be lost, unless an advance could be obtained on the freight, and there is therefore ground to presume that the owner, giving a power to mortgage in ample words, would intend to authorize a form of mortgage well-known to be often needed."[2] Again an agent with authority to subscribe a policy has an implied authority to do everything necessary for procuring the adjustment[3] and even to submit a dispute to arbitrations.[4] So an authority to buy railway shares implies a power to do all that is needful to complete the bargain.[5] It must, however, be noted that as a rule of construction (which will be dealt with hereafter) all formal powers, *e. g.*, powers of attorney will be construed with strictness, and that the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect; and, further, that in the case of powers given in an informal or less formal manner or by implication, such powers are never construed so as to authorize acts not obviously within the scope of the particular matters to which they refer.[6] Therefore a broker authorized to sign a particular contract is not authorized to sign one omitting a stipulation;[7] nor has he any right to sign one containing a stipulation not authorized by his employers.[8]

Land Agents &c.—Bearing in mind this rule of Construction, it will follow that an agent specially employed to sell an estate cannot sell it in a manner unauthorized by his authority, the extent of the authority being known to the purchaser.[9] So an agent for purchase, is not an agent to reconvey.[10] So an agent empowered to make a lease for lives or for years is not empowered to make an agreement in which the term of the proposed lease is not mentioned.[11] Nor will a power to grant *ticca izarah* leases, and when advisable to sell, mortgage, and make gift of the whole or portion of a zemindary,

[1] Ind. Contr. Act, s. 251.

[2] *Wilks* v *Palmer*, 7 C. B. N. S, 340, (359).

[3] *Richardson* v *Anderson*, 1 Camp., 44, (note)

[4] *Goodson* v. *Brooks*, 4 Camp., 163, but see *Stead* v *Salt*, 3 Bing, 101 *Adams* v *Bankart*, 1 C. M & R., 678. *Hatton* v. *Royle*, 3 H &. N, 500

[5] *Bayley* v. *Wilkins*, 7 C. B, 886

[6] Story on Agency, paras. 68, 69, 87 *Atwood* v. *Munnings*, 7 B & C 278.

[7] *Pitts* v. *Beckett*, 13 M. & W., 743.

[8] *Jardine Skinner* v. *Nathoram*, Bourke's Rep., 43. *Esanchunder Sing* v *Samachurn Bhutto*, 6 W. R 57.

[9] *Rundle* v. *Secretary of State*, 2 Hyde, 25, 36, 44

[10] *Bhujanund Mytee* v. *Radha Churn Mytee*, 7 W. R., 335.

[11] *Clinan* v. *Cooke*, 1 Sch. & Lef., 32.

authorize the creation of a permanent tenure, the donor of the power exercising no disposing power.[1] Nor will a power to manage as a land agent include a power to grant leases for a term of years.[2] Nor can a land agent whose powers to lease were confined to do so after consultation with his principal, enter into an agreement with a farmer to grant him a lease for 12 years, but without communicating to him the fact his power was specially limited.[3] Nor can an agent of an *inamdar* to whom the management of a certain village is entrusted, grant leases on *suti* or on other permanent tenures without an express authority so to do;[4] nor has the ordinary agent of a zemindar who has no power to lease, an authority to sanction the *quasi*-transfer of a lease by a tenant to some third party.[5] Nor is an agent to receive rents authorized to receive notices on behalf of the lessor.[6] Nor is a manager on behalf of a body of mohunts empowered to grant mocurari leases.[7] But a *shebait* has been held to be empowered to alienate a reasonable portion of the property belonging to an idol, if such alienation is absolutely required by the necessities of the management, *e. g.*, for the restoration of an image or tenantable repairs of a temple.[8] And it appears also to have been held that there may be cases in which the grant of a putni tenure by a *shebait* would be valid.[9] But a power to execute leases will not include a power to insert therein a covenant binding the principal to pay any costs of suits regarding possession of the property demised.[10] Nor will a manager of an estate under a *sufaenamah* have power without a special authority to represent his principal in suits, or charge him with the costs of defending a suit bought against him.[11]

Naibs, Gomastas.—Nor will a general power given to a naib authorize him to grant pottahs for fixed rents;[12] nor can a naib with such a power grant mocurari leases,[13] nor indeed does he usually have power to grant leases unless specially authorized:[14] nor can he distrain unless specially authorized[15] and it is so

[1] *Tyebunnissa* v. *Kafiz Fatima*, 13 C. L R., 247.

[2] *Collen* v. *Gardner*, 21 Beav., 540, (542)

[3] *Cóllèn* v. *Gardner*, 21 Beav, 540.

[4] *Narsarvanji Hormasji* v. *Narayan Trimbak Patil*, 4 Bom H. C. (A. C J.), 12.

[5] *Rai Moraree Debee* v. *Bucha Sing*, 4 N. W. P. H. C., 122

[6] *Barnet* v. *Skinner*, 2 W. R, 209; but now under Act VIII of 1885, see s. 147.

[7] *Sheo Shunkar Lall* v *Dhurm Joy Pooree*, 8 W. R. 360

[8] *Tahboonissa Bibee* v. *Sham Kishore Roy*, 15 W. R., 228.

[9] *Shibessuree Debia* v *Moothooranath Acharjo*, 13 W. R (P. C.), 18.

[10] *Poornachunder Sen* v. *Prosunno Coomar Doss*, I. L. R. 7 Calc., 253.

[11] *Bholanaath Sandyal* v *Gouree Pershad Moutro*, 16 W R., 310.

[12] *Goluckmonee Dabea* v. *Asmooddeen*, 1 W. R, 56. But under Act VIII of 1885, see s. 187.

[13] *Unnoda Pershad Bannerjee* v. *Chunder Seekur Deb*, 7 W. R, 394. *Punchanum Bose* v. *Peary Mohun Deb*, 2 W. R., 225.

[14] *Ooma Tara Debia* v. *Puna Bibee*, 2 W. R., 155.

[15] Act VIII of 1885, s. 141, (1), no order has as yet been made by the Local Government under this section. *Kally Mohan Roy* v. *Ramjoy Mundal*, 2 Hay, 289, Marsh, 282.

with a gomasta; nor has a gomasta with a power to collect rents only, any power to distrain [1] But it has been held under the old rent law that a suit for rent may be instituted by a gomasta employed in the collection of rents or the management of land on behalf of his principal without being specially empowered by warrant of attorney.[2] So also a tehsildar under the same act, had a similar power.[3] But as regards these two last cases, they are no longer law in Bengal as far as the gomasta or tehsildar's powers to sue are concerned, as such an agent cannot under Act VIII of 1885, s. 145, unless specially authorized, bring suits.

Mooktahs.—Nor can a moktar under a moktarnamah giving to him authority to defend a suit on behalf of a mortgagee, acknowledge the mortgagor's title, and that is so irrespective of the Limitation Act of 1859.[4] And it clearly would not be within the scope of his authority so to do under the Limitation Act of 1877 unless he is specially authorized [5] Nor can a mooktah holding a power of attorney authorizing him to let and set and to deposit money in Court, and to apply for documents, grant a lease on behalf of his principal with a stipulation that the lessor shall pay all expenses which the tenant might incur in any litigation which might take place between him and third parties.[6] And where a mortgagee signed a moktarnamah in which he stated that he would abide by any arguments which might be urged, and any documents which might be filed by the mooktah thereby appointed, and the mooktah subsequently filed a written statement signed by himself alone in which he admitted the mortgagor's title, *held* that the written statement could not be incorporated with the moktanamah so as to make it part of the document signed by the mortgagee.[7] But where a general mooktah acting on behalf of co-sharers does formal acts to enforce the rights of his zemindar's principals, it is not necessary to trace back his authority in such case to the explicit sanction of every single member of the family.[8] Nor can a mooktah under a moktarnamah given by a purdanashin lady declaring that "all acts done by her mooktah, such as giving and taking of loans to and from others, getting executed deeds of sale", bind the lady on an account stated for a debt without proof that the money had been borrowed on the lady's account [9] Nor has a mooktar any implied authority to bind his principal by executing conveyances.[10] Nor will a mooktar empowered to

[1] *Kalee Coomar Dass* v *Anees*, 3 W R., (Act X), 1 See Act VIII of 1885, s 141

[2] *Meajan Khan* v *Akally*, Marsh 334; *Madho Singh* v *Guneshee Lall*, 2 Agra H C, 275

[3] *Modhoosoodun Singh* v *Moran and Co*, 11 W R, 43

[4] *Lutchmee Buksh Roy* v *Panday Runjeet Ram*, 12 W. R, 443

[5] Limitation Act, XV of 1877, s 19

[6] *Kenny* v. *Mookta Soonderee Dabee*, 7 W. R, 419

[7] *Lutchmee Buksh Roy* v *Runjeet Ram Pandey*, 13 B L R, 177, 20 W R, 375; 12 W R, 443

[8] *Hurry Kisto Roy* v *Motee Lall Nundee*, 14 W. R, 36

[9] *Sudisht Lall* v. *Sheobarat Koer*, I. L R., 7 Cal., 245; L. R, 8 I A, 39
Mohan Kooer v. *Ajoodhya Doss*, 20 W. R., 119

execute bonds in lieu of former debts authorize the execution of a bond to secure a debt already barred by limitation.[1] But a power to watch suits, to appoint pleaders or mooktars, to receive after giving receipts any money deposited and due in any Court, to act in dakhil karij, to purchase villages with such money due under decrees, to file receipts, acquittances, razinamahs and other documents, will not authorize a reference to arbitration.[2] Nor does a power to sue authorize the agent to employ a vakeel on other than a reasonable remuneration.[3] Nor does a power to appear and sue in or defend any suit, and to act in all such proceedings as the principal himself could do, authorize the agent to enter into a special arrangement with a vakil agreeing to remunerate him according to the amount recovered.[4]

Other Agents.—Nor does a power to raise money upon bonds on behalf of three persons, authorize the entering into a bond on behalf of one or more to the exclusion of the rest.[5] Nor does a power to execute a bond in lieu of former debts authorize a power to secure a debt barred by limitation.[6] So a power to raise upon ship's papers such monies as the master should deem necessary for the repairs of a ship does not authorize the master to sell or mortgage the ship.[7] Nor does a power to sell or mortgage for payment of debts authorize the execution of a simple money bond for the same purpose.[8] Nor under a general power to sell, assign and transfer can an agent pledge for his own debt.[9] Nor does a power to purchase, include a power to sell.[10] Nor does a power to negociate, make, sale, dispose of, assign and transfer Government Securities authorize a pledge of such Securities and the execution of a promissory note for the amount advanced.[11] Nor can a mercantile agent, without a power so to do, draw or endorse bills and notes, though the power may be implied from circumstances.[12] Nor will a general authority to transact business and to receive and discharge debts, confer upon an agent the power of accepting or endorsing bills of exchange so as to bind his principal. Nor will an authority to draw a bill of exchange of itself impart an authority to endorse it.[13] So

[1] *Hurlal Sukul* v *Ram Goti Dey Roy*, 11 C L R, 581

[2] *Thakoor Pershad* v *Kalka Pershad*, 6 N W P H C, 210

[3] *Keshav Bapuji* v. *Narayan Shamrav*, I. L. R., 10 Bom, 18

[4] *Rao Saheb, V N Mandlik* v *Kamaljabai Saheb Nimbalkar*, 10 Bom, H C, 26.

[5] *Budh Singh Dudhuria* v. *Devendra Nath Samul*, 11 C L R, 323.

[6] *Hublal Sukul* v *Ram Goti Dey Roy*, 11 C. L. R., 581

[7] *Judah* v. *Addi Raja Queen Bibi*, 2 Mad. H. C., 177

[8] *Poorna Chundor Sen* v. *Prosunno Coomar Doss*, I. L. R. 7 Cal., 253

[9] *De Bonchet* v. *Goldsmid*, 5 Ves., 211.

[10] *Goluck Chunder Chowdhry* v. *Kanto Pershad Hazaree*, 15 W. R, 317

[11] *Watson* v. *Jonmenjoy Coondoo*, I. L. R., 8 Cal., 934; I. L R., 10 Cal., 901.

[12] *Pestonjee Nessarwanjee Bottlewallah* v *Gool Mahomed Sahib*, 7 Mad, H. C., 369; but see now Act XXVI of 1881, s. 27.

[13] Act XXVI of 1881, s. 27.

the manager of a farm who conducts all its business has no implied authority to issue bills in the name of the principal.[1] Nor does a power to advance to a certain person sums of money to provide for payment of Government revenue and for the current expenses of an estate, authorize the lending to that person of large sums on bonds.[2]

So an agent employed to receive a debt, must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent.[3] Nor will an agent who holds a general power to manage a business, have power, in the name of his principal, to enter into an unusual contract not strictly relating to the conduct of that business.[4] So a general agent employed to carry on a trading business has no authority to deal with immoveable property.[5]

Acknowledgement of debts.—Nor can an agent not specially authorized for that purpose acknowledge by his signature the liability of his principal in respect of any property or right.[6] Nor can an agent authorized by a widow and guardian of her minor children acknowledge a debt so as to bind the minors; nor can the mother and guardian in the absence of any special authority so bind them.[7] Nor can the managing member of a Hindu joint family bind his coparceners by acknowledging a debt which would otherwise have become barred by limitation.[8] Nor has a partner told off to wind up the partnership any authority to acknowledge debts, as the presumption of agency which arises in active partnerships, no longer exists.[9]

Insurance agents—Nor is an ordinary local agent of an Insurance Company without special authority, authorized to bind the Company by a contract to grant a policy;[10] In this case the Company admitted the agency, but said the agent's duties were to canvass for insurance and obtain proposals, and to receive a deposit of one-fourth of the probable praemium, to get the cattle inspected by the Company's veterinary surgeon, and his declaration signed, and that on the receipt of the proposal by the Company, it was accepted or declined.

[1] *Davidson* v *Stanley*, 2 M & G., 721.

[2] *Misram* v. *Gopal Lal Doss*, 10 W. R 376.

[3] *Barker* v. *Greenwood*, 2 Y. & C., 414. *Sweeting* v. *Pearce*, 7 C. M. N. S., 449, (484 & 485).

[4] *Mundaree Lall* v *Gilmore*, 3 Agra H. C., 196.

[5] *Doorga Churn* v. *Koonjbeharee Pandey*, 3 Agra H. C., 23

[6] Act XV of 1877, s. 19.

[7] *Wajibun* v. *Kadir Buksh*, I. L. R., 13, Calc., 292; 13 C. L R., 292; *Hossain* v. *Lloyd*, 1. L. R., 7 Bom., 515.

[8] *Kumarasmi Nadan* v. *Pala Nagappa Cnetti*, I. L. R, 1 Mad., 385. *Chinnaya Nayudu* v. *Gurrunathan Chetti*, I. L. R., 5 Mad., 169

[9] *Premji Ludha* v *Dossa Doongersey*, I. L. R., 10 Bom, 358.

[10] *Linford* v. *Provincial Horse and Cattle Insurance Company*, 34 Beav., 291.

Secretary of a Company.—Nor has a Secretary of a Tramway Company any authority to make representations with regard to the financial situation and relation of the Company where no evidence is given of the existence of such an authority.[1] Nor has the managing agent of a trading Company abroad authority to sign on behalf of the Company a promissory note, which was not necessary for the Company's trading and not directly authorized by the Company.[2]

Extent of authority of Directors.—The extent of the authority of directors as agents to bind a Company, is stated by Lord Romilly in *Spackman* v. *Evans*[3] to be, that the Company are not bound by any acts done by them for objects which the Company has no power to entertain, and that these are the only acts which, if the directors do, are *ipso facto* void. But that not only do the acts of the directors bind the Company when done within the scope of their authority, but also that where the acts of the directors, however irregular, belongs to a class of acts which class is authorized by deed of settlement, in these cases, the Company is absolutely bound when the acts are done with strangers who act *bonâ fide* with the Company; and when these acts are done with the shareholders of the Company then that these acts are voidable only; and that the other shareholders must take active steps to set aside the transaction, and that when there is no dishonesty time bars the remedy. Their general authority therefore extends to all acts reasonably necessary for management,[4] but not to acts which are *ultra vires*.[5]

Statutory authorities of certain agents.—A recognized agent may make any appearance, application, or act, in or to any Court required or authorized by law to be made or done by a party in such Court, except when otherwise expressly provided by any law for the time being in force; provided that any such appearance shall be made by the party in person if the Court so direct.[6] A naib or gomasta of a landlord when empowered by writing, is, for the purposes of the institution of suits and the making of applications, under the Bengal Tenancy Act 1885, such a recognized agent as is last mentioned, and this notwithstanding that the landlord may reside within the jurisdiction of the Court in which the suit or application is instituted or made.[7] Such an authority requires to be stamped under Act 50, Sch. II of Act I of 1879. But such naib or gomasta

[1] *Barnett* v. *South London Tramway Company*, L. R., 18, Q. B. D, 815.

[2] *In re Cunningham & Co. Ld. Simpson's claim*, L R., 36 Ch. D, 533.

[3] L. R., 2 H. L., (534).

[4] *West of England Bank, exparte Booker*, L R., 14 Ch. D., 317.

[5] *Pickering* v *Stephenson*, L R., 14 Eq., 322.

[6] Act XIV of 1882, ss. 36, 37.

[7] Act VIII of 1885, s. 145.

must sue in the name of his employer,[1] although he may sign and verify the plaint either in his own name or that of his employer.[2] An agent of a landlord also has power for the purposes of the Bengal Rent Act to act on his employer's behalf in Court, if expressly authorized so to do in writing, and to give and accept all notices on his employer's behalf; and may if authorized in writing certify every document required by the Act, except an instrument authorizing an agent.[3] And where he is acting for joint landlords, he must be authorized by both of them.[4]

II Every lawful thing justified by the various usages of trade.—The following cases are examples of powers incidental to the authority, arising from custom of trade. In *Wilshire* v *Sims*,[5] an agent was employed to sell out 500£ of stock; he shortly after this order agreed to sell it to one Wilshire; but as the transfer could not be made for 14 days for certain reasons relating to the meetings of the trustees of the Company, Wilshire paid for the stock by a promissory note at 14 days; the agent paid in this note to his own bank to his own account, where it was attached for a debt of his own; at the expiration of the 14 days the principal refused to make the transfer, as he had received no part of the purchase-money. Lord Ellenborough said, "When the defendant (the principal) employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did any one ever hear of stock being absolutely exchanged for a bill at 14 days? Has a broker in common cases power to give credit for the price of the stock which he agrees to sell? The broker here sold the stock in an *unusual* manner; and unless he was expressly authorized so to do, his principal is not bound." In *Dingle* v *Hare*,[6] an agent selling guano was held authorized to warrant it to contain 30% of phosphate of best quality, Byles J., said, "It is clear law that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it was usual in the trade for the seller to warrant, the agent had authority to warrant. So the appointment of a general agent for the sale of goods implies an authority to sell according to the ordinary usage of trade.[7] So where a general authority was given to a broker employed in the

[1] *Modhoo Soodun* v. *Moran & Co.*, 11 W R., 43 *Mokha Hurruckhraj Joshee* v. *Bussesur Doss*, 13 W R., 344 *Koonjo Behary Joy* v *Poorno Chunder Chatterjee*, I. L. R., 9 Calc., 450, 12 C. L. R., 55

[2] Act VII of 1882, s. 1.

[3] Act VIII of 1885, s. 187

[4] Act VIII of 1885, s 188

[5] 1 Camp., 257.

[6] 7 C B N. S., 145

[7] *Howell Ex-parte*, 12 L. T., 785

Irish Market to sell a quantity of butter, it was held that evidence was admissible to prove that by the usage of that market, that such an authority expired with the day on which it was given.[1] So also where a corn merchant in Ireland sent instructions to a factor in London to sell oats of a certain quality at a certain price on the corn merchant's account, it was held that evidence was admissible to show that by the usage of the London corn trade, a broker might sell in his own name.[2] So an agent authorized to collect hundis and who, after acceptance by the drawee gives credit to his principal for the amount, by the usage of *shroffs* is entitled on the hundi being dishonoured by the drawee to treat himself as a holder for value.[3] So the power to sell a horse, and to receive the price would in the case of a horse-dealer include a power to warrant.[4] So also where the usage was that an agent should guarantee the purchasers of his principal it was held that the former had acted rightly in paying a debt incurred by his principal under the shelter of this guarantee.[5] So a power to a land agent to manage and superintend estates, authorizes him on behalf of his principal to enter into an agreement for the usual and customary leases, according to the nature and locality of the property.[6] But nevertheless terms not incidental to those in the written contract cannot be introduced by custom.[7]

Is knowledge of the usage necessary.—The question whether, in order to affect a person with a usage of trade, the usage should be known to the party to be charged presents some difficulties. Lord Kingsdown when delivering the judgment of their Lordships of the Privy Council in *Kirchener* v. *Venus*[8] says:—"When evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that *the parties who made the contract are both cognizant of the usage*, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." With regard to this case Kelly C. B, in *Buckle* v. *Knoop*,[9] says:—"it only proves that people in Liverpool may well be supposed to be ignorant of rules in existence on the other side of the world, at Sydney; they are not in such a case required to know them. But here the contract is entered into between merchants of London and Liverpool, cognizant of the Bombay trade, and it

[1] *Dickinson* v. *Lilwall*, 4 Camp, 279.

[2] *Johnston* v *Usborne*, 11 A & E, 549

[3] *Mulchand Joharimal* v. *Suganchund Shivdas*, I. L. R., 1 Bom., 23.

[4] *Brady* v. *Todd*, 7 C. B. N S, 415

[5] *Seth Sumur Mull* v *Choga Lall*, I L R., 5 Calc, 421.

[6] *Peers* v. *Sneyd*, 17 Beav, 151.

[7] *Allan* v *Sundras*, 1 H & C., 142. *Muncey* v *Dennis*, 1 H. & N., 211.

[8] 15 Moo., P. C., 361, (399).

[9] L. R., 2 Ex., 125, (129).

relates to a subject matter connected with London, Liverpool and Bombay. Under these circumstances, a customary interpretation of the contract may be proved, although no proof be given affirmatively that one of the parties had heard or knew of the custom" And Channell B., says:—It is contended that the evidence (of usage) was improperly admitted, because it was not shown affirmatively that both parties to the contract were aware of the usage, and in support of that contention the case in the Privy Council *Kirchener* v. *Venus* was cited. But the objection merely amounts to this, that the evidence was inadmissible because it was incomplete for want of other evidence, showing that the usage was known to both parties. That is an objection rather to the weight of evidence than to its admissibility" In *Sutton* v *Tatham*[1] a case decided in 1839, it was held that a person employing a broker on the London Stock Exchange impliedly gives him authority to act in accordance with the rules there established, even though the principal is himself ignorant of such rules. This rule was subsequently approved in *Bayliffe* v. *Butterfield*[2] and has been followed as will be presently seen in numerous cases. In the case of *Bayliffe* v. *Butterfield*, the question whether the principal must be cognizant of the usage was not definitely decided *Bailiffe* v. *Butterfield* was a case brought by a Liverpool sharebroker against a manufacturer living at Oldham, the latter having employed the broker to sell him twenty scrip shares in a certain Railway: a sale was effected to certain other sharebrokers of Liverpool; but on the day on which the shares should have been delivered, the defendant made default, whereupon the purchasers bought an equivalent number of shares in the market, and called upon the plaintiff to pay him the difference between the contract and market price; the broker paid the demand, and in an action brought by the broker against the manufacturer to recover the sum so paid and for commission it was proved to be the usage on the Liverpool Stock Exchange for brokers to be answerable to each other for engagements entered into between them for third parties; there was some evidence to show that the defendant was cognizant of the usage, *but no point was raised upon that question on the trial.* Rolfe B, directed the jury to find a verdict for the plaintiff for the amount of the commission only, but reserved leave to the plaintiff to move to enter a verdict for the full amount claimed. A rule was so obtained and argued. Parke B., in giving judgment after assuming the usage to be the established usage of the Liverpool Stock Exchange, said:—"I consider it to be clear law, that if there is, at a particular place, an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way; and if it be the usage that he should make the contract in his own name, he has authority to do so. Supposing

[1] 10 A. & E., 27. [2] 1 Exch., 425.

it were necessary to shew that the defendant knew of the particular usage the point should have been made at the trial; and in the present case there was evidence for the jury to find that the defendant did know of it, and that he was responsible. *It is not now necessary to decide the point, whether the defendant would be bound if he did not know of such a usage.* It appears to me, however, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed. There is the case of *Bartlett* v. *Pentland*;[1] that, however, was not with respect to the usage of the Stock Exchange but of insurance brokers ..... that, however, is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract, if it is made in the usual way. There is another case of *Gabay* v. *Lloyd*,[2] which was an action on a policy of insurance, it was found in the special verdict, that a certain usage with respect to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee house, and that the policy in question was affected there; but it was not found that the plaintiff was in the habit of effecting policies at that place. The Court held that this usage was not sufficient to bind the plaintiff. But that case differs from the present, the question here being as to the authority which the plaintiff received. I have said this in order to show my concurrence in the opinions expressed by Lord Denman and Mr Justice Littledale in the case of *Sutton* v. *Tatham*, although it is not necessary to determine the same point here, as there was sufficient evidence to show that the defendant knew the usage of the Stock Exchange at Liverpool, if it were requisite to prove it in order to make him liable." Alderson, B., said shortly and generally, "A person who deals in a particular market must be taken to deal according to the custom of that market, and he who directs another to make a contract at a particular place, must be taken as intending that the contract may be made according to the usage of that place." Rolf B., said:—"The dealing here was at a particular place—the course of dealing was known. It may be, indeed, *that it is not material whether the course of dealing was known to the parties.* In *Sutton* v. *Tatham*, the defendants did know of the usage. I express my concurrence with the *dicta* of Lord Denman and Mr. Justice Littledale." Mr. Taylor in his work on Evidence, 3rd ed., p. 165, says; "It may be taken as clear law that if a man deals in a particular market, he will be presumed to act according to the custom of that market, and if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place ..... but whether the doctrine would be held to apply in its full force in cases of maritime insurance

[1] 10 B. & C., 760. [2] 3 B. & C, 793.

may admit of some doubt, as authorities are not wanting to the contrary." The class of cases referred to by Mr. Taylor appear to show that the usage of a particular locality or of a particular class of brokers (insurance brokers at Lloyd's) will not be binding upon persons unless those persons are acquainted with the usage and adopt it, as will be seen from the cases of *Bartlett* v. *Pentland*,[1] already referred to and *Sweeting* v. *Pearce*[2] and *Stewart* v. *Aberdeen*,[3] which latter case has, however, been commented upon by a learned writer as being unsatisfactory.[4] The cases referred to by Mr Taylor, do not, however, appear to have been judicially impugned; but they appear principally to deal with insurance cases and to have been decided on the ground that "Lloyds" is a mere private place of business, and not a general market, so as to come within the rule of *Sutton* v. *Tatham*. The rule laid down in *Sutton* v. *Tatham*, was, however, approved by Bovill C. J., in *Grissel* v. *Bristowe*,[5] and appears to have been followed or adopted in numerous cases.[6] But in the year 1875, the case of *Robinson* v. *Mollet*,[7] came before the House of Lords, which dealt with the particular usage of the London tallow market; and in this the rule above referred to appears to have undergone modification. The question before the Court there was, whether the appellant was bound, by a custom as to brokers existing in the London tallow market of which he was ignorant, merely by the employment of the Respondents as his brokers to buy for him and their purchase in the London market of the quantity of tallow ordered? It will be sufficient to give short extracts from the opinion of Mr. Justice Brett and Mr. Justice Grove (who were amongst other Judges called before the House) as showing the rule which runs through the decision. Mr. Justice Brett said:—"If the custom which exists in fact is not unjust as against principals ignorant of it, your Lordships will uphold it, however much it departs from the rule hitherto recognized by the Courts as applicable to the contract of employment between principals and brokers, but, if it so far breaks from those rules as to be unjust to such principals in such contract, your Lordships will pronounce it to be a void custom ..... The question therefore may be stated thus; Is the custom relied on so inconsistent with the nature of the contract to which it is sought to be

[1] 10 B. & C., 760.

[2] 7 C. B. N. S., 449.

[3] 4 M. & W., 211.

[4] See *Campbell on Sale of Goods and Agency*, p 441.

[5] L. R., 3 C. P., 127; L. R., 4 C. P., 36.

[6] *Taylor* v. *Stray*, 2 C. B. N. S., 175. *Stray* v *Russell*, 1 El & El, 888. *Groves* v. *Legge*, 2 H. & N., 210, 216. *Lloyd* v. *Guibert*, 35 L J Q. B. *Duncan* v *Hill*, L. R, 8 Ex., 242. *Cuthbert* v. *Cumming*, 10 Exch., 809; 11 Exch., 405. *Lacey* v. *Hill*, L. R, 8 Ch., 921. *Lacey* v. *Hill (Crawley's Claim)*, L R., 18 Eq., 182.

[7] L. R., 7 H. L., 802.

applied as that it would change its nature altogether, or as to change its intrinsic character? if it would, it is unjust and therefore void, if it would not, it should be allowed to prevail," Mr. Justice Grove said:—"The question in this case is, can the ordinary duty (of a broker) be varied by the custom of a market of which the employer is ignorant in fact, and, from the circumstances of the case, cannot reasonably be presumed to know? This custom (of the tallow market) appears to me not merely to exchange modes or incidents of the sale, *e. g.*, mode of delivery, time and manner of payment, degree of credit, rate of discount &c., but to change substantially the nature of the employment and the relations of the parties to the contract. I do not think a person dealing in a market of the customs of which he is ignorant, though he may be bound to inquire as to usages such as those I have referred to, or if he do not inquire into them may fairly be deemed bound by them, is bound to inquire into a usage by which a broker is in fact not a broker, or is bound by the acts of a supposed broker when he has not all the correlative advantage resulting from the performance of a broker's duties for which he pays commission. ..... If the short terms of a mercantile contract, because they do not expressly exclude other than the ordinary accompaniments, are to be taken to admit of such being incorporated with them when they vary the ordinary legal relations of the parties to them, if such variance of relation be a custom of a market known only to one of the parties, and advantageous or possibly advantageous to such party, it seems to me that elements of great uncertainty would be introduced into such supposed contracts, business transactions would be much hampered, and the parties be not really *ad idem*." Lord Chelmsford in delivering the judgment of the House of Lords said: "Assuming, however, that the custom would have been applied in the present case if it had been known to the appellant at the time of employing the respondents (as to which his Lordship had expressed a doubt previously that it did apply) the question arises whether it is of such a nature as to be binding on a person who is ignorant of its existence, by merely employing a broker to buy for him in the market where the custom prevails. The effect of the custom is, to change the character of a broker who is an agent to buy for his employer, into that of a principal to sell for him. No doubt a person employing a broker may engage his services upon any terms he pleases; and if a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages provided they are such as regulate the mode of forming the contracts, and do not change their intrinsic character. It was not contended in the present case that if the respondents were employed in the ordinary character of brokers, they had performed their duty to their employers. Of course, if the appellant knew of the existence of the usage, and chose to employ the respondents without any restriction upon them, he might

be taken to have authorized them to act for him in conformity to such usage. ..... Assuming that the usage of the London tallow market applies to the case of an ordinary transaction between broker and principal, I hesitate to say that it would not apply to the case of persons knowing of its existence, and employing a broker to act for them in the market where it prevails. But the usage is of such a peculiar character, and is completely at variance with the relation between the parties, converting a broker employed to buy, into a principal selling for himself, and thereby giving him an interest wholly opposed to his duty, that I think no person who is ignorant of such a usage can be held to have agreed to submit to its conditions, merely by employing the services of a broker, to whom the usage is known, to perform the ordinary and accustomed duties belonging to such employment" With this judgment Lord Cairns, Lord Hatherley, and Lord O'Hagan agreed. From this decision, therefore, may be deduced the following rules:—

1. That if a principal employs a broker to act for him on a market with the usages of which he is unacquainted, he authorizes the broker to make contracts upon the footing of such usages, provided they are such as to regulate the mode of performing the contract and do not change its intrinsic character.

2. That if the principal is aware of such usages, and choses to employ a broker to act for him without restricting him, he will be bound by such usages.

3. But, that where the usage is of a peculiar character, and is so inconsistent with the nature of the contract to which it is sought to be applied, as to change its nature altogether, or as to change its intrinsic character, it will not be binding upon a principal ignorant of such usage.

Principal ignorant of usage not bound where it is unreasonable — It appears, however, that the rules laid down in *Robinson* v. *Mollett* comprise the rule that a principal ignorant of a usage of a market will not be bound, if the usage is an unreasonable one. In *Perry* v. *Barnett*,[1] a case next to be referred to for another purpose; the Master of the Rolls, when speaking of the contention raised that a principal (who in that case was found to be ignorant of the usage of the London Stock Exchange) was nevertheless bound by the usage as he had employed the broker to deal for him on the London Stock Exchage, as being assumed to know such usages, said:—"Now the proposition that a person who directs another to deal upon a particular market is to be treated as if he knew the rules of that market, has been adopted in the law to some extent, but certainly not to this extent, that, however unreasonable or illegal they may be, he is still to be treated as if he knew them. There is a line of demarcation between rules by which such person is bound, and rules by which he is not

[1] L. R., 15 Q. B. D., 388, 393, 394, 395.

bound, and the rules of the Stock Exchange applicable upon this occasion would seem to come within the latter of these." His Lordship further on added "therefore, adopting the rule I laid down in Robinson v. *Mollett*, and which seems to comprise the rule in *Neilson* v. *James*,[1] I am of opinion that even though it be proved as a matter of fact that there exists such a rule on the London Stock Exchange as that to which I have alluded (*viz.*, the usage set up in the case), it would be wrong to say that the defendant who was ignorant of it, ought to be treated as if he knew it, merely because he instructed the plaintiffs to deal upon the London Stock Exchange." And Baggallay L. J., also in that case said; "Then it was urged next that if the defendant gave the plaintiffs authority to purchase on the London Stock Exchange he was bound by the rules of the Stock Exchange as to such purchase. But in my opinion, the defendant was only bound by such rules as were reasonable and proper rules. That point was distinctly recognized in *Neilson* v. *James*." But where the usage is one which treats as a valid legal contract for one purpose that which is no legal contract at all, and which could not be enforced in law against the other contracting party, it has been held that knowledge of the alleged usage is essential In *Perry* v. *Barnett*,[2] where the question was whether a person, not a member of the Stock Exchange, or acquainted with its customs, but an outsider, was bound by such a custom without knowledge: Grove J. said: "I am of opinion that he is not. I think that if a person, to use the language of Lord Chelmsford in *Robinson* v. *Mollett*,[3] employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character. It seems to me impossible to say that in this case the alleged usage does not change the intrinsic character of the contract. The usage appears to me to be one which treats as a valid contract for one purpose that which is no legal contract at all, and one which the defendant could not enforce in law against the other contracting party. The authority given to the broker is to buy so many shares in the Oriental Bank. The broker instructs his agent on the Stock Exchange, who forwards a note which would, to any one unacquainted with the practice of the Stock Exchange, appear to be a note of a legal contract which the buyer could himself enforce against a seller, but it appears that in fact, in consequence of non-compliance with the provisions of Leeman's Act, no valid contract has been effected at all, and therefore the buyer could not, if the shares had risen in value, and the seller had repudiated, have enforced this contract against him at law. It seems to me, under these circumstances that he does not get what he bargained for. But then it is said that there is a usage on the Stock Exchange, not by which the invalid contract can

[1] L. R., 9 Q. B. D., 546. [2] L. R., 14 Q. B. D., 467. [3] L. R., 7 H. L., 802, (836).

virtually be made valid, but by which the broker employed by the purchaser may be made personally responsible on the Stock Exchange upon such contract. If the purchaser knew of that, and if he contracted with his agent on that basis, he may be held to be liable, as was done in the case of *Read* v. *Anderson*,[1] because he has knowingly changed the position of the agent and made him subject to certain liabilities in consequence of his carrying out an order in the manner in which the person giving the order knew that it would be carried out. But if the purchaser is ignorant of the usage, and thinks when he authorizes the broker to effect a contract, that a contract means a contract enforceable at law, can it be said that he is to be affected by that which is not a contract and is not enforceable at law? It seems to me that on this ground there is a broad distinction this case and *Read* v. *Anderson* ..... In the case of *Read* v *Anderson*, Bowen L J., in delivering the judgment of the majority of the Court of Appeal, expressly bases his judgment on the fact that by the usage known to both parties the betting agent became liable; and in that case not only was the usage taken to be known to both parties, but the plaintiff had actually effected that which he was authorized to effect. He was not commissioned to make a contract but a bet, and I do not think in that case, it would be far-fetched to assume that the person employing the agent did know that a bet was void at law, because that is common knowledge." In *Seymour* v. *Bridge*,[2] where the selfsame usage was in question, but where it was assumed throughout as the basis of the judgment that the *principal did know*, or was to be *taken to have known, of the usage;* Mathew J., held on the authority of *Read* v. *Anderson*, that the broker was entitled to recover. But in all cases, it must be remembered that a custom if unreasonable is not binding, and that the knowledge of the person to be bound may be an important element in deciding whether a custom is reasonable or not.[3]

Oral evidence of usage when admissable.—Next as to when oral evidence of a usage by which incidents not expressly mentioned in any written contract may be given. The general rule is, that when the terms of a contract, ... have been reduced to the form of a document, or any matter required by law to be reduced to the form of a document, have been duly proved, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of of contradicting,[4] varying, adding to, or subtracting from its terms.[5] This rule

[1] L. R., 13 Q. B. D., 779

[2] L. R., 14 Q. B. D., 460

[3] *Perry* v. *Barnett*, L R , 15 Q. B. D., 397.

[4] *Moores* v. *Panchanada Pillay*, 5 Mad , H C., 135. *Moran* v. *Mitta Bibee*, I. L. R., 2 Calc., (89). *Juggernath Seiv Bux* v. *Ram Dyal*, I. L. R., 9 Calc., 791. *Clarton* v. *Shaw*, 9 B. L. R , 245, (252).

[5] Act I of 1872, s. 91, 92.

is subject to certain exceptions, one of which is, that, any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved, provided that the annexing of such incident would not be repugnant to,[1] or inconsistent with[2] the express terms of the contract.[3] A very strong instance of parol evidence being admitted for the purpose of qualifying the contract, is to be found in the case of *Hutchinson* v. *Tatham*[4] decided in the year 1873, there the defendants acting as agents for one Lyons, chartered a ship for the conveyance of a cargo of currants from the Ionian Islands. The charterparty was expressed to be made and was signed by the defendants "as agents to merchants," the name of the principal not being disclosed and the Court *held*, that evidence was admissible, in an action by the shipowners against the defendants upon the charterparty, of a trade usage, by which, if the name of the principal is not disclosed within a reasonable time, the agents themselves are personally liable. Bovill C. J., in delivering judgment said :—"The question ..... arises whether evidence is admissible to add a term not expressed in the contract, to the effect that if the principal be not disclosed within a reasonable time from the signing of the contract, then the agent is to be personally liable. It is the general rule that evidence is admissible for the purpose of explaining the terms of a contract with reference to the usage of a particular trade, and of showing that a term which, *primâ facie*, would have one meaning, may have in such trade another well understood meaning. The question sometimes arises as to the meaning of a particular expression, but it also arises as to whether, on a contract which purports to be made by a party as agent, he can be charged as principal. Within my experience the question has arisen whether such a custom exists in many of the trades in London. In *Humphrey* v. *Dale*[5] the contract was, as it seems to me, substantially the same as this ..... There is nothing unreasonable in such a custom, and I have known it applied by the findings of juries to many branches of trade. There is good reason for such a custom ..... after the cases of *Humphrey* v. *Dale*, and *Fleet* v. *Murton*,[6] it seems to me impossible to contend that this evidence is inadmissible. Brett J., said :—"The question here is as to the meaning of a written document, and as to whether parol evidence was admissible for the purpose of qualifying it. I have had very considerable doubt as to what is the effect of this document with respect to the admissibility of the parol evidence. In the body of the contract

[1] *Macfarlane* v. *Carr*, 8 B. L. R., 459.

[2] Act I of 1872, s 92, prov. (5) and also a case in 2 Summ , 567, an American report cited in *Taylor* v. *Enid*, p 103 (8th ed.) adopted by this section.

[3] *Indur Chandra Dugar* v. *Lachmi Bibi*, 7. B. L. R., 682, (687).

[4] L. R., 8 C. P., 482.

[5] 7 E. & B., 266.

[6] L. R., 7 Q. B., 126.

it is stated that it is made by the defendants as agents to merchants, and the signature is to the same effect. This appears to me a much stronger case than *Humphrey* v. *Dale* and *Fleet* v. *Murton*. It does seem a strong thing, when a person expressly says to another in a written document, that he is not contracting with him as principal, and in signing that writing states the same thing again, to hold that it can by any evidence afterwards be established that he is liable not as agent but principal. On the authority of what was said by Cockburn C. J., in *Fleet* v. *Murton*, and Hill J., in *Deslandes* v. *Gregory*,[1] it is clear that without evidence of custom the defendants would not be liable as principals. So strong do I consider the terms of this contract in this respect, taking the terms in the body and the signature together, that were evidence offered to show that from the beginning the defendants were liable as principals, I should be prepared not to admit it; but the cases have lately gone very far as to the admissibility of evidence of custom. It is clear, however, that no such evidence can be admitted to contradict the plain terms of a document. If evidence were tendered to prove a custom that the defendants should be liable as principals under all circumstances that would contradict the document; but it has been decided that though you cannot contradict a written document by evidence of custom, you may add a term not inconsistent with any term of the contract." Grove J., said:—"It is not easy to define exactly the limits within which evidence of mercantile custom is admissible to vary the meaning of a written contract. It is clear that evidence is not admissible to contradict the writing: but in one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effect of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary. The evidence of custom that is admissible must be, it appears to me, evidence of something inconsistent and irreconcileable with the written contract. The evidence here can only be admissible if the import of the words "as agents" is such as to exclude a collateral provision for liability as principals in a certain contingency, it is not attempted to show that the defendants' principals would not *primâ facie* and in most cases be liable as principals, and not the defendants, but that in a certain particular contingency the defendants might themselves be personally liable. This does not seem to me so inconsistent and irreconcileable with the contract as to amount to a contradiction or variation beyond what is admissible."

Usage how proved.—And where it is necessary to prove a custom, the party seeking to establish it must begin by shewing the existence of the custom, not by asking what the custom is.[2]

Custom as to Tazi Mandi Chittis.—The defendants directed the plaintiffs'

[1] 2 El. & El., 602, (607).

[2] *Gibson* v. *Crick*, 1 H. & C., 142.

brokers to make purchases of opium on their behalf, and to pay money on his account in respect of what are commonly known as *tazi mandi chittis*, and the plaintiff subsequently sued the defendant to recover monies paid by them in respect of such *tazi mandi chittis* issued by them on defendant's account and for brokerage and commission. The question arising in the suit was whether or no the right to recover was affected by the Wagering Act, Act XXI of 1848, which was then in force but which has since been repealed by Act IX of 1872, sections 23 and 30 of the latter Act would, however, raise the same question. The usage and course of dealing with reference to these *chittis* as proved in the particular case cited, was that persons wishing to speculate upon the rise or fall of opium apply to shroffs in the bazaar to issue to them documents which are known in the bazaar as *tazi* and *mandi chittis;* a *tazi chitti* being an agreement by the shroff issuing the same, to deliver to the holder of such chitti a certificate of purchase for one lot or five chests of opium from the Government sale at a certain price mentioned, or at the option of the holder, in lieu of delivering such certificate, to pay to him the difference between the actual market price thereof, and the price named in the said *tazi chitti:* a *mandi chitti* is an agreement by a shroff issuing the same to accept and pay for the price named in such *chitti* upon demand being made by the holder of such *chitti*, a certificate for one lot of opium of the Government sale mentioned in such *chitti*. Such *chittis* being issued by shroffs to their customers at a rate of commission, varying from two to four rupees for each *chitti*, it being usual for the customers to deposit with the shroffs a sum of money to cover any loss which the shroffs might sustain by reason of having to carry out the agreement contained in the said *chittis*. Where, however, the customer is well-known to the shroff, he is given by the shroff credit for the price of the *chittis*, the latter undertaking the liability without requiring a deposit, upon the undertaking that the customers would, in the case of *tazi chittis*, either provide him with such certificates as might be required in order to meet such chittis, or pay the difference between the actual market price of such certificates and the price mentioned therein, and would in like manner *mutatis mutandis* provide for any loss which might accrue upon the *mandi chittis;* that if the shroff should himself purchase or sell certificates for the purpose of meeting his liabilities, he should be entitled to charge the customers brokerage at the rate of one rupee per lot of five chests; *Tazi and Mandi chittis* when so issued are sold by the persons to whom they are issued by the shroffs, and are, by the usage of the bazaar, transferable by endorsement, and at midnight of the day of the Government sale mentioned in such *chittis*, if the price of the opium in case of *tazi chittis* be higher, and in case of *mandi chittis* lower, in the market than the price mentioned in such *tazi or mandi chittis*, the holders of such *tazi or mandi chittis* respectively present the same to such shroffs for acceptance, and the shroffs, upon accepting the said *chittis* become liable to

the holders according to the tenor thereof, looking to their customers on account of whom such *chittis* are issued to indemnify them; such *chittis* as are not presented for acceptance before midnight of the day of the sale, become void according to bazaar usage, and in some instances are retained or destroyed by the holders, and in others returned to the shroffs who are in the habit of paying 4 or 8 annas for each of such *chittis* as are delivered up to them. The Court held that the plaintiff was entitled to recover.[1] The judgment in the above case gives no grounds for decision, but the case was evidently decided on the grounds of the case cited in the note thereto[2] and on the same principle as the English cases on an analogous subject.[3]

III Agent's duty in an emergency—The rule that an agent has power in an emergency to do all such acts, for protecting his principal from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances, is a power given by statute.[4] And although, such power does not appear to be fully recognized in England, yet in particular cases the right is allowed as is pointed out by Mr. Macrae in this work on the Indian Contract Act.[5] Instances of such an authority may arise out of cases in which an agent is entrusted with the sale of goods of a perishable nature, where, if proper measures are not taken to get rid of the goods, loss would be occasioned to the principal. Thus where A consigns provisions to B at Calcutta with direction to send them to C at Cuttack, B will have authority to sell the provisions at Calcutta if they will not bear the journey to Cuttack without spoiling. "Goods may become worse the longer they are kept, and at all events, there is the risk of the price becoming lower" per Best C. J., in *Maclean* v. *Dunn*,[6] which was a case of a re-sale of goods sold originally through a broker, but of which the purchasers would not take delivery, but whether the goods were re-sold by the broker of the owner it does not clearly appear from the report. It also appears that an agent for sale may repair goods previous to sale when necessary.[7] It has been stated previously that the rule does not appear to be fully recognized in England; and this will be seen from the case of *Hawtayne* v. *Browne*[8] which is an authority for saying that a power to do what what is usual, does not include a power to do what is unusual, however urgent it may be to act. Maule J., in that case told the jury that they might infer

[1] *Kanaylal* v. *Chagmal Battia*, 8 B. L. R., 412.

[2] *Khairabnath Khettri* v. *Jumanram Dhandaria*, 8 B. L. R., 415, (note).

[3] *Rosewarne* v. *Billing*, 15 C. B. N. S., 316. *Read* v. *Anderson*, L. R., 10 Q. B. D., 100.

[4] Ind. Contr. Act, s. 189.

[5] Macrae on Contr., p. 149.

[6] 4 Bing. 722, (729).

[7] Ind. Contr. Act, s. 189, ill. (*a*).

[8] 7 M. & W., 595.

an authority in the agent, not only to conduct the general business of the mine, but also, in cases of necessity to raise money for that purpose. As to this, Parke B, said :—"I am not aware that any authority is to be found in our law to support this proposition. No such power exists, except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honour of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners, and therefore, it is, that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary. If that case be analogous to this, it follows that the agent had power not only to borrow money, but, in the event of security being required, to mortgage the mine itself; the authority of a master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent. I am therefore of opinion that the agent of this mine had not the authority contended for." Baron Alderson, said, "There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money, and pledge the credit of his principals for its repayment; and even if it were so, in this instance there was ample time and opportunity for him to have applied to his principals. Several cases have been cited as analogous to the present, but they have been satisfactorily distinguished by my Brother Parke. *Lamb* v. *Bunce*[1] may appear to be a case similar to the present, but it is very distinguishable, for there is an original liability in parish officers to support the poor in their parish; and it appears, moreover, that the parish officers in that case were aware of the surgeon being in attendance on the pauper, and made no objection." It is to be noticed from this judgment that the case of master of a ship providing the means of continuing a voyage, or the repairs of the ship, and the case of an acceptor of a bill of exchange for honor of the drawer, do not under English law fall within this ruling last mentioned, and that such acts will, under English law, be implied from the authority of such agents, for other reasons than those of emergency, affording no analogy to the case of an ordinary agent. But although such analogy has been expressly repudiated in England it appears that having regard to the words of section 189 of the Contract Act, the case of a master of a ship acting on an emergency, and that of any other class of agent acting on an emergency, stand, in this country, directly on the same footing.

It is, however, true that the ground on which such an authority is implied

[1] 1 M & S., 275

in the master's case, is, in England, necessity, arising by virtue of his particular employment; and that the same implication has been made in his favour on similar grounds in this country, previously to the passing of the Indian Contract Act.[1] But whether or no the express authority given by the Contract Act to *all* agents to act on an emergency, was intended by the legislature to override the implied authority given otherwise to the master of a ship, it is unnecessary to discuss; as whether it does so or not, his case appears to afford, in this country, an illustration to the section in question inasmuch as his case *could* be brought within the terms of the section. Moreover such cases may be usually referred to for the purpose of pointing out the duty imposed upon agents of communicating with their principals, when it is possible to do so. Before referring to cases on this subject, it may be well to point out more fully the grounds on which a master of a ship has under English law an implied authority to sell the goods of an absent owner. This authority is only to be implied from the situation in which he is placed, and consequently to justify his thus dealing with the goods he must establish, *first*, a necessity for the sale; and *secondly*, inability to communicate with the owner and obtain his instructions. "It is under these circumstances, and by force of them, that the master becomes the agent of the owner, not only with the power, but under the obligation within certain limits, of acting for him; but he is not entitled, in any case, to substitute his own judgment for the will of the owner, in the strong act of selling the goods where it is possible to communicate with the owner and ascertain his will."[2] As to this, at least so far as regards other classes of agents, it appears that the strict rule of communicating with the principal before sale, would in India be modified by s. 189 of the Contract Act. There may be an urgent necessity for a sale arising from the fact that if the goods are not sold they will perish, or that they will have to be kept in warehouses at a great expense, so that as a matter of business it would be wrong to warehouse them; but in England it must be shewn that the master had no means of communicating with the owner and taking his directions whether he shall sell them or not. But, whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owner before they actually perish, he cannot (according to English law) sell without communicating with the owner and obtaining his directions; and if the master obtains directions, and the owner of the goods refuses his consent to a sale, the master cannot sell, although the goods are of a perishable nature. Indeed the law is that *primâ facie* the master has no authority to sell.[3] With reference to this duty to communicate,

[1] *Bayley* v. *Taruknath Poramani*, Bourke, (O. C.), 263.

[2] *Australasian Steam Navigation Company* v. *Morse*, L. R., 4 P. C., 222, (228).

[3] *Acatos* v *Burns*, L. R., 3 Ex D., 282, (290).

the law in this country is that it is the *duty* of agents in all cases of difficulty to use all reasonable diligence in communicating with their principals, and in seeking to obtain instructions from them.[1] If therefore time will admit of it, it is the duty of an agent, before acting in the business of the agency in an unusual manner, to seek instructions from his principal; if, however, the emergency is pressing, and there be no time for such communication, he will be fully justified in taking such steps as a prudent man would take in endeavouring to mitigate or avoid any loss which may result to the subject matter of the agency. The extent of this duty is well illustrated in the case of *The Australasian Steam Navigation Company* v. *Morse*,[2] by their Lordships of the Privy Council, when speaking of the duty of a master to communicate with the owners before making a sale of cargo, and may be made use of as a general example of the duty of all agents in this country. In that case which was decided in 1872, the plaintiffs, sheep farmers, sent to their agent at Rockhampton 19 bales of wool to be shipped on board the defendant's ship Boomerang for conveyance from Rockhampton to Sydney. These 19 bales formed portion of a cargo comprising 260 bales of wool consigned to nineteen separate consignees in Sydney. The Boomerang struck on a rock and filled, and the whole of her cargo became submerged, and more or less damaged by salt water The cargo was taken out, transhipped into another vessel, and taken back to Rockhampton. In the course of transhipment from the Boomerang many of the bales of wool unavoidably burst open, and the wool belonging to different consignees became mixed, and the wool on its return to Rockhampton, to which place it was conveyed with reasonable despatch, was dirty, and stank and was heated and in danger of ignition. The weather was rainy and there were no stores in the town of Rockhampton in which the wool could have been unpacked and dried, and the wool was in immediate peril of increased and serious damage. Under these circumstances, at the instance of the master, assisted by the agents of the shipper, the wool brought back was surveyed, and a report drawn up which recommended it should be sold immediately. Whereupon, owing to the urgency of the case, the cargo was by direction of the master of the Boomerang sold at public auction At the trial the Judge submitted to the jury, amongst other matters; did the defendants the owners of the vessel, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the plaintiffs? had the defendants, considering all the circumstances of the case, time and opportunity to obtain instructions from the owners? the jury found the 1st of these questions in the negative, and the latter in the affirmative. The case eventually came up before their Lordships of the Privy Council. Their Lordships, after laying down the general principles of law as to the authority of a master under certain circumstances to

[1] Ind. Cont Act, s. 214.

[2] L. R., 4 P. C., 222.

sell the goods of an absent owner, to which principles I have before referred; said, "the summing up of the Chief Justice of the Supreme Court of New South Wales is impugned on the ground that it was misleading in two, amongst other, points, *first* by the explanation of the word "necessity" as being equivalent to "a high degree of expediency" "highly expedient," &c. and secondly by the question whether the defendants had acted as "wise and prudent men;" and said, of the word, "*necessity*," "it has undoubtedly been employed in cases of this kind to express the urgency of the occasion which must exist to justify the act of the master, but the word "necessity" when applied to mercantile affairs, where judgment must, in the nature of things be exercised, cannot of course mean an irresistible compelling power, what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken that it was in a mercantile sense necessary to take it"..... and after upholding the manner the question had been left to the jury, their Lordships said "A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case, the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly be the duty of the master to sell, as a better course for the interest of the owner of the property than to save it by incurring on his behalf a wasteful expenditure. It was further objected," said their Lordships, "that the attention of the jury was not sufficiently directed to the condition of the specific bales of wool belonging to the plaintiff, ... it is plain that the ship was a general ship, that the wool belonged to numerous owners, that all of it was more or less damaged, and that some of it was so intermixed as to render it difficult within the time at the master's disposal, and the small resources of the port, to deal with the bales separately, these facts had properly great weight with the jury when they came to consider what it was practicable for the master to do with such a cargo." Their Lordships then dealt with the duty and possibility of the master communicating with the owners or the consignees, holding that he must, to hold himself free from responsibility, establish an inability to communicate with the owner of the goods, and that the possibility of communicating with the owners depended on the circumstance of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port, the means of communication which may exist, and the general position of the master in the particular emergency; that

such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained before the sale, but that where there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by him to obtain the owner's instructions. And upheld the finding of the jury in favour of the Australasian Steam Navigation the defendants in the action As regards the duty of communicating with the owners of the goods, their Lordships, after laying down the general principle to which I have previously referred, said, "the sale, if justifiable at all, must have taken place speedily, for the perishable condition of the wool, which alone justified the master in selling, made it necessary there should be an immediate disposition of it" And after finding that it was not possible for the master to communicate with the owners, said;—There can be no doubt that the master is bound to employ the telegraph as a means of communication where it can be usefully done, but, in this case, the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and circumstances in which the master was placed, were proper subjects to be considered by the jury, together with other facts, in determining the question of the practicability of communication ... . It is obvious when a ship is in distress at a distant port, from whence communication with all the owners is impossible, and with any of them difficult, that the task of selecting (where all are entitled to consideration) those with whom he can and could communicate, must add greatly to the master's labour, and might at times require an amount of time and attention which he could not give unless he neglected more passing duties connected with saving and dealing with the goods Such a state of things, when it exists, is clearly within the range of the circumstances which the jury may properly be directed to consider in estimating the conduct of the master" A further example of this duty before acting on an emergency may be instanced by the case of *Wilkinson* v. *Wilson*[1] "*The Bonaparte*" which was one, between the owners of cargo and the person to whom a bottomry bond had been transferred, as to the validity of a bottomry bond, purporting to effect a ship and cargo, the question whether it affected the cargo alone coming up before their Lordships of the Privy Council There a Swedish vessel bound from a port in Sweden to Hull, was driven by stress of weather into another port in Sweden Ten days after her arrival the cargo was unladen, and the ship found to be greatly damaged The repairs were completed, and the cargo reloaded The master at once communicated with *the owners* of the ship, resident in Sweden, who being without funds consented to the master taking up a bottomry bond for payment of the necessary repairs, and the British Consul at the port

[1] 8 Moo, P. C. C, 459.

where the vessel lay, wrote on behalf of the master and as his agent, to the consignees at Hull, informing them of the damage sustained by the vessel, but making no application to them for money, nor referring to the necessity of repairs. No answer was made to this letter, and the master hypothecated the ship freight and cargo for the money borrowed for the repairs; held that such notice to the consignees was sufficient notice to authorize the master raising the money by bottomry on the cargo. Further examples of action taken in cases of difficulty may be found in *Hunter* v. *Parker*,[1] *Trouson* v. *Dent*,[2] *Gaudet* v. *Brown*,[3] *Christie* v. *Row*[4] and *The Elizabeth*.[5] But before concluding this question of "emergency," it may be well to refer to the case of *Chapman* v. *Morton*[6] in which case, in the judgment of the Chief Baron, reference is made to a somewhat peculiar unreported case, in which it was held that the agents could not be considered to be agents of necessity to dispose of the cargo, (which case, however, would in all probability be considered to be a case falling within section 189 of the Contract Act); there a shipment of goods was made from a port in Italy to Malta; at the time of the arrival there the plague raged, the consignees accordingly sent the ship to Messina, and there sold the cargo. The vendors having failed, and an action being brought by the owners of the goods against the consignees at Malta, the latter were held responsible, it being considered that the circumstances of the case did not make them agents of necessity to dispose of the cargo on behalf of the vendors

Implied authority of particular kinds of agents; Partners.—Each member of a partnership is its general agent, the extent of his authority is determined by the kind of acts which are necessary or usually done in carrying on the business of such a partnership as that of which he is a member. Partners may stipulate among themselves that some one of them only shall enter into particular contracts or into any contracts, or may restrict in any way they please the powers of any one of them, but with such private arrangements, third persons dealing with the firm *without notice*, have no concern. The public have a right to assume that every partner has authority from his co-partners to bind the whole firm by acts done or contracts entered into which are necessary for the purpose of the partnership business.[7] The question what is necessary for the purpose of carrying on a partnership must of course be determined by the nature of the particular business carried on by the partners.

[1] 7 M. & W., 342. See also *Blyth* v. *Birmingham Water Works Company*, 11 East., 784.
[2] 8 Moo., P. C., 419.
[3] L R, 5 P. C, 164, 165.
[4] L R, 4 Q. B., 127; L. R., 5 Q. B, 544.
[5] 2 Dodson, 403
[6] 11 M & W., 534.
[7] Ind Contr. Act, s. 251. See *Cox* v. *Hickman*, 8 H. L Cas, 262, (304)

But the act of one partner to bind the firm must be *necessary* for the carrying on of its business, if all that can be said of it was that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners.[1] What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is a fair test; but nevertheless as a partner is in the same position as any other agent, he will be at liberty in an emergency to do all such acts for the purpose of protecting his co-partners from loss as would be done by a person of ordinary prudence in his own case, under similar circumstances,[2] this distinguishes the law so far from that laid down in *Hawtayne* v. *Bourne*.[3] There appears, however, to be a marked distinction between monies borrowed and debts contracted for the necessary purpose of carrying on or preserving a business. This distinction will be found in consulting the cases *Hawtayne* v *Bourne* and *Hawken* v. *Bourne*,[4] and the words in which this distinction is pointed out by Lord Chief Justice Turner in *Ex-parte Chippendale in re German Mining Company*.

Authority in all cases of partnership —Generally it may be said that every partner, whatever the nature of the partnership business, will be presumed to have power, to engage clerks for the benefit of the firm.[5] As to this authority Lord Rolf doubted whether in every case it would be necessary, when a contract is entered into with partners, to show, in order to charge them all, that benefit would necessarily result to the firm; and said that "there might be cases in which the partnership would be bound, although that might not be the case; but it must always be a strong fact to show that the partner acted for the firm if it be established that the contract was for the benefit of the firm; the point to be considered in each case is, is the party acting for himself alone, or on account of the firm."[6] To make tender of a debt due by the firm;[6] to receive payments due to the firm,[7] to grant receipts for debts due to the firm;[8] to release a debt,[9] but not in fraud of his co-partners and collusively,[10] and not so as to set it off as against a private debt of his own;[11] to draw cheques in the name of the

[1] *Brettel* v. *William*, 4 Ex, 630.
[2] Ind Contr. Act, s. 189
[3] *Hawtayne* v. *Bourne*, 7 M. & W., 595. *Ex-parte Chippendale*, 4 De G, M & G, 19.
[4] 8 M. & W., 703.
[5] *Beckham* v. *Drake*, 9 M & W., 79.
[6] *Douglas* v *Patrick*, 3 T R, 683
[7] *Anon Case*, 12 Mod, 446. *Duff* v. *East Indian Company*, 15 Ves., 118, (213).
[8] *Henderson* v. *Wild*, 2 Camp, 561; *Bristow* v. *Taylor*, 2 Stark, N. P. C., 50.
[9] *Hawkshaw* v. *Parkins*, 2 Swanst, 539.
[10] *Aspinall* v. *London and North-Western Railway Company*, Ha, 325.
[11] *Piercy* v. *Fynney*, L. R, 2 Eq., 69.

firm or the firm's bankers;[1] even though he be a sleeping partner;[2] and probably to engage to pay a debt due by the firm.[3]

Authority of firm of bankers.—A managing partner in a firm of *mahajans* has power to bind his co-partners by a bond securing payment of a debt due by the firm.[4] So one member of a firm of bankers has been held to have authority to accept security for a debt due to the firm.[5] It also appears that one partner in a banking or agency house abroad has power to grant a letter of credit binding on his co-partners,[6] and that a banker may negociate bills deposited by his customer, to such an extent as the necessary demands of the latter may require without express authority.[7] A banker also has authority when his customer accepts a bill made payable at the bank, to apply what balance he may have in hand belonging to such customer in payment of the bill, even though there be no express order to pay.[8] But is there no implied authority for a bank to pay a third person a note made payable at its place of business, simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instruction so to apply the deposit.[9]

In commercial partnership.—The authority of the partners depends on the nature of the particular business carried on by the firm; but it has been held that the sale of one partner is the sale of the firm;[10] that one partner has a power to borrow on the credit of the firm when necessary so to do;[11] and if he has power, to borrow it has been held that he may pledge the personal property of the firm for that purpose, and such power is not gone upon dissolution of the firm;[12] that one partner has power to get an advance upon drafts, and bind the firm by his action, unless the person making the advance was aware that the advance was intended for the separate account of the borrower;[13] that he has power to procure an insurance for himself and co-partners on partner-

[1] *Laws* v. *Rand*, 3 C. B. N. S., 442.

[2] *Backhouse* v. *Charlton*, L. R., 8 Ch D., 444.

[3] *Lacy* v. *McNeile*, 4 D. & Ry., 7.

[4] *Hakim Syud Ahmed Hossain* v. *Kurneedan*, 24 W R, 60.

[5] *Weikersheim's Case*, L. R, 8 Ch. App, 831, (838).

[6] *Hope* v. *Cust*, 1 East, 53.

[7] *Thompson* v. *Giles*, 3 D. & R., 733

[8] *Kymer* v. *Lawrie*, 18 L. J. Q B., 218.

[9] *Grisson* v. *Commercial National Bank*, L. T. 20th July 1889.

[10] *Lambert's Case*, Goodbolt, 244

[11] *Gordon* v. *Ellis*, 7 M. & G. 607, (621); *Rothwell* v. *Humphreys*, 1 Esp., 406. *Denton* v. *Rodie*, 3 Camp, 493; *Lane* v. *Williams*, 2 Vern, 277. *Beckham* v *Drake*, 9 M & W, 79.

[12] *Butchard* v. *Dresser*, 4 DeG., M. & G., 542.

[13] *Ex-parte Bonbonus*, 8 Ves., 540.

ship property ;[1] that one partner has power to assent to a creditor's composition deed,[2] that he may buy goods on credit, and this, even though the goods be pawned by the buyer, provided that there is no collusion between the buyer and the seller ;[3] that he may borrow money and give a note therefor in the name of the firm, though the money be not brought into partnership, nor the note given with the privity of the other partners ;[4] but it submitted that such borrowing must be shown to be necessary for the business. And if the business of the partnership be such as ordinarily requires bills of exchange, then unless restrained by agreement, any one partner may draw, accept and endorse bills of exchange in the partnership name for partnership purposes,[5] but he has no implied power to accept bills in blank, nor to bind his co-partners, otherwise than jointly with himself,[6] nor can he bind them severally by joint and promissory note signed by himself and by him on their behalf.[7] But partners may bind each other by drawing, accepting or endorsing bills of exchange or promissory notes in the name of the firm,[8] and provided that the bill or note be directed to the partnership, he may do so in his own name.[9] So also all contracts of sale or purchase by one partner on joint account, and for the purposes or connected with the partnership are binding on the firm.[10] So also a promise or admission by one partner will bind the firm.[11] He has, however, no implied authority to pay a private debt with partnership funds.[12] But a partner in a firm not being an ordinary trading partnership, but merely a Carrying Company, formed for the purpose of carting goods from a railway to a town, and for the carrying on of whose business the drawing and accepting of bills or making promissory notes is in no way necessary, has no implied authority to bind such firm by promissory notes in the name of the firm.[13] Nor will partners be bound by a joint security given by one of the partners for a transaction not relating to the partnership, except where the firm's express or implied sanction

[1] *Hooper* v. *Lusley*, 4 Camp , 66

[2] *Dudgeon* v *O'Connel*, 12 Ir. Eq., 566, (573).

[3] *Bond* v. *Gibson*, 1 Camp , 185.

[4] *Lane* v *Williams*, 2 Vern , 277.

[5] *Ex-parte Darlington District Joint Stock Banking Company*, 34 L. J. Bk., 10, (12).

[6] *Hogarth* v. *Latham*, L. R., 3 Q. B D., 643.

[7] *Perring* v. *Hone*, 4 Bing., 32.

[8] *Swann* v. *Steele*, 7 East., 210. *Maclae* v. *Sutherland*, 2 El. & Bl , 1 *Bank of Australia* v. *Breillat*, 6 Moo., P C., 152.

[9] *Hall* v. *Smith*, 1 B. & C., 407. *Wilks* v. *Back*, 2 East., 152. *Wells* v. *Masterman*, 2 Esp., 731.

[10] *Sandilands* v. *Marsh*, 2 B. & Ald., 680 ; *Brettel* v. *Williams*, 4 Ex., 623.

[11] *Duncan* v. *Lowndes*, 3 Camp., 478.

[12] *Kendal* v. *Wood*, L R., 6 Ex , 243.

[13] *Premabhai Hemabhai* v. *Brown*, 10 Bom. H. C., 319. Act XXVI of 1881, s. 27.

can be shown, or where the giving of such security is necessary for the carrying on of the business of the firm;[1] nor has one partner any authority to bind the partnership in any other name than that held out to the world as the name of the firm.[2] Nor has one partner any implied authority to open a banking account on behalf of his firm otherwise than in the name of the firm[3] although it appears he may transfer the partnership account.[4] And one partner has no implied authority to mortgage immoveable property belonging to the partnership business without the consent of the others;[5] nor has he implied power to take a lease for the firm of a house for partnership purposes;[6] nor can he refer a dispute the subject of a suit to arbitration;[7] nor can he submit partnership disputes to arbitration;[8] nor can he consent to judgment against the firm;[9] nor has an agent, appointed by all the partners to wind up their business authority to accept bills drawn on the firm, or to accept a bill in the name of one partner.[10] He has power to execute a joint and several promissory note if it is necessary for the business.[11] In a firm consisting of printer and publisher, the publisher has in certain circumstances implied power to order goods on credit and bind the firm; thus where in an action by stationers who supplied paper for two particular works, on the orders of the publishers of the works, against the printers of them, on the ground that the printers and publishers were partners in the works, it was held that if the printers were partners in the publications at the time when the orders were given they were liable, although the publishers only were liable in the first instance.[12]

Authority of a Kurta.—When the acts of a managing member of a Joint Hindu family proceed from an intention to provide for some family need, or to perform an indispensable religious duty, or to benefit the joint estate, they are binding upon the other members of the family.[13] The manager by Dayabhaga law carrying on a family business has power to mortgage the joint family pro-

[1] *Crawford* v *Stirling*, 4 Esp., 207. *Duncan* v *Lowndes*, 3 Camp., 478.

[2] *Pritchard* v. *Draper*, 1 Russ. & M., 199

[3] *Alliance Bank* v. *Kearsley*, L. R., 6 C. P, 433

[4] *Beale* v. *Caddick*, 2 H. & N, 326.

[5] *Juggewundas Keeka Shah* v. *Ramdas, Brijbookun Das*, 2 Moo I. A, 487. *Harrison* v. *Delhi and London Bank*, 1. L R, 4 All., 427, (458).

[6] *Sharp* v. *Milligan*, 22 Beav., 606.

[7] *Hatton* v. *Royle*, 3 H & N, 500

[8] *Stead* v. *Salt*, 3 Bing., 101

[9] *Munster* v. *Cox*, L R, 10 App Cas, 680. *Hambridge* v. *De la Cronée*, 3 C. B., 742.

[10] *Odell* v. *Cormack*, L. R., 19 Q B. D., 223.

[11] *Maclae* v. *Sutherland*, 3 E & B., 1. *Elliot* v. *Davis*, 2 B. & P. 338.

[12] *Gardner* v. *Childs*, 8 C. & P., 79.

[13] *Saravana Tevan* v. *Muttayi Ammal*, 6 Mad, H C., 71, 6 Moo., I. A., 393, Tagore Lectures for 1885, p. 236.

perty and such mortgage is binding on all the members of the partnership.[1] The manager in carrying on an ancestral trade can pledge the property and credit of the family for the necessary and ordinary purposes of that trade, and third persons dealing *bonâ fide* with such managers are not bound to investigate the status of the family, minor members even being bound by the necessary acts of the manager.[2] By necessary acts are meant such as are necessary for the material existence of the undivided family or the preservation of the family property; but a compromise between co-partners of partnership accounts, and differences by transfer and division of partnership property is not such a necessary act, but is one which is left to be dealt with by the ordinary rules of law, and is one which must be shown clearly to be for the benefit of the infant members before the compromise will be enforced. He may grant a receipt for payment of a debt due to the joint family.[3] He may in his discretion expend moneys for the improvement of the family dwelling house, and enter into a mortgage to obtain moneys for that purpose.[4] He may mortgage the interests of the family estate of the other members of the family, for any common family necessity, or for the common benefit and use of the undivided family.[5] But a mortgage of the joint family property by the manager is not binding upon his adult co-sharers unless it is shewn that it was made with their consent either express or implied; in cases of implied consent, it is not necessary to prove its existence with reference to a particular instance of alienation, but a general consent may be deducible in cases of urgent necessity from the very fact of the manager being intrusted with the management of the family estate by the other members of the family, and the latter entrusting the management of the family affairs to the manager must be presumed to have delegated to him the power of pledging the family credit or estate when it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them and obtain their consent before pledging the estate or their credit.[6] He cannot alone consent to the enhancement by his landlord of a joint family tenure, or give an ekrah to that effect so as to bind his co-sharers.[7] He has no power by acknow-

[1] *Bemola Dossee* v. *Mohun Dossee*, I. L. R., 5 Calc., 792.

[2] *Ramlal Thakursidas* v. *Lackmichand Munnram*, 1 Bom. H. C., Ap., 51. *Trimbath Anant* v. *Gopalshet Mahaden*, 1 Bom. H. C., (A. C. J.), 27. *Johuree Bibi* v. *Sree Gopal Misser*, I. L. R., 5 Calc. 470. *Shan Narain Singh* v. *Rughobur Dyal*, I. L. R., 3 Calc., 508. *Joykristo Cowar* v. *Nittyanand Nundy*, I. L. R., 3 Calc., 738.

[3] *Sangappa Chanbasappa* v. *Sahebanna bin Kangedappa*, 7 Bom., H. C., A. C., 141.

[4] *Ratnam* v. *Gobindurajulu*, I. L. R., 2 Mad., 339.

[5] *Gundo Mahadev* v. *Rambhat bin Bhanbhat*, 1 Bom., H. C., 80.

[6] *Miller* v. *Runga Nath Moulick*, I. L. R., 12 Cal., 389. See *Mahabeer Pershad* v. *Ramyad Sing*, 12 B. L. R., 90; 20 W. R. 192.

[7] *Hemayetoolah Chowdry* v. *Nil Kanth Mullick*, 17 W. R., 139.

lodgment to revive a debt barred by limitation, except as against himself,[1] or when acting as the duly authorized agent of his co-sharers.

Authority of attorneys.—Attorneys or solicitors under a general authority have authority to accept service of process and appear and defend an action, but not to institute a suit for which a special retainer is necessary[2] and a retainer to protect a party from arrest is authority to put upon bail.[3] He has also authority to waive irregularities in the action;[4] and to compromise it;[5] but not against the express wish of the client,[6] but such compromise will bind the client if the other side act *bonâ fide* and without notice of a prohibition to compromise;[7] he has power to receive payment[8] or tender[9] of debt and costs, even after judgment.[10] One member of a firm of attornies has no implied authority to bind his co-partners by a post-dated cheque.[11] He has also power to refer a suit to artibitration;[12] he may waive irregularities, as to agree to the appointment of an arbitrator by chance;[13] he has authority to submit to produce title deeds;[14] he may bind his client by formal admissions relating to the action;[15] he has authority to empower his clerks to receive payment.[16] An agreement that an attorney is to be paid out of a fund only implies that he is to be continued till there is a fund.[17] When authorized to make a payment under an award which directed mutual releases to be drawn up, he has been held to be empowered to draw a release.[18] He has a statutory right of retainer over sums received by him on account of his principal on account of business conducted by him and

[1] *Gopalnaraın Mozomdar* v. *Muddomutty Gupta*, 14 B. L. R., 21. *Kunarasami Nadan* v. *Pala Nagappa Chetti*, I. L. R, 1 Mad, 385.

[2] *Wright* v. *Castle*, 3 Mer., 12. *Lord* v. *Kellett*, 2 M. & K., 1.

[3] *Buckle* v. *Roach*, 1 Chitt, 193

[4] *Backhouse* v. *Taylor*, 20, L. J. Q. B., 233.

[5] *Jagannath Das Gurubaksdas* v *Ramdas Gurubaksdas*, 7 Bom. H. C, (O. C.), 79. *Bacon's Abr.* "*Attorney*" *D. Chowne* v. *Parrott*, 14 C. B. N. S., 74. *Prestwich* v. *Poley*, 18 C. B. N S., 806.

[6] *Fray* v. *Voules*, 1 E. & E., 839.

[7] *Butler* v *Knight*, L. R., 2 Ex., 109. *Brady* v. *Curran*, 2 Ir. R., C L., 314.

[8] *Powell* v. *Little*, 1 Wm. Bl., 8. *Mason* v. *Whitehouse*, 4 Bing., N. C., 692.

[9] *Wilmot* v. *Smith*, 3 C. & P., 453.

[10] *Bevins* v. *Hulme*, 15 M. & W., 96.

[11] *Foster* v. *Mackreth*, L. R., 2 Ex, 163

[12] *Faviel* v. *Eastern Countries Ry. Co.*, 2 Ex, 344.

[13] *See Backhouse* v. *Taylor*, 20. L. J. Q. B., 233.

[14] *Fenwick* v. *Reed*, 1 Mer., 114.

[15] Taylor on Evid, 684, para. 700,

[16] *Moffatt* v. *Parsons*, 5 Taunt., 307. *Kirton* v. *Braithwaite*, 1 M. & W., 310.

[17] *Hollings* v. *Booth*, 2 F. & F., 220.

[18] *Dawson* v. *Lawley*, 4 Esp., 65.

also a lien on goods bailed to him.[1] But he has, however, no implied authority, when retained for the conduct of a suit, after judgment in favour of his client, to enter into an agreement on his behalf to postpone execution;[2] but he may defer execution in consideration of the acceleration of the payment of the debt;[3] he has no implied authority to pledge his client's credit to counsel by an express promise to pay his fees, whether they relate to litigation or not, so as to enable the Counsel to sue his client for them;[4] nor will the fact that he is in possession of a mortgage deed executed by his client, authorize him to receive the mortgage money for the client.[5] He has no no power to refuse to proceed with an action he has undertaken presumedly on the terms of getting the costs out of the other side.[6] Nor can he when acting for a vendor or mortgagee receive purchase-money without a special authority, even though he may have possession of the deed of conveyance with the deed endorsed.[7] Nor can he institute an action without a special retainer.[8] Nor can he when authorized to proceed in an action to recover a debt, oppose in the Insolvency Courts a discharge of the debtor.[9] He has not without special instruction authority to take special journeys on behalf of his client;[10] nor can he bind his partners by bills and notes.[11]

Implied authority of master of a ship.—Presuming that the implied authority of the master is not touched by the statutory authority given to all agents by the Contract Act, the master of a ship has authority to do all things necessary for the due termination of the voyage in which his ship is engaged,[12] but his implied authority does not exist in cases in which the owner can himself by agent personally interfere.[13] He has implied authority to procure all "necessary supplies," for the ship, *i. e.*, such things as are fit and proper for the ship upon the voyage.[14] He may borrow money for the necessary repairs of

[1] Ind. Contr. Act, 217, 171. See also *Ex-parte Morrison*, L. R., 4 Q B., (155).

[2] *Lovegrove* v. *White*, L. R., 6 C P., 440

[3] *Commonwealth Land Estate & Co., in re Hollington*, 43 L. J. Ch, 99

[4] *Mostyn* v. *Mostyn*, L. R., 5 Ch., 457.

[5] *Ex-parte Swinbanks, in re Shanks*, L R, 11 Ch. D., 525. *Bowdillon* v. *Roche*, 27 L. J., Ch., 681

[6] *Harrington* v. *Binns*, 4 F. & F., 942.

[7] *Withington* v. *Tate*, L. R., 4 Ch., 288.

[8] *Wright* v. *Castle*, 3 Mer., 12; *Lord* v. *Kellett*, 2 M. & K., 1.

[9] *Drake* v. *Lewin*, 4 Tyr., 730.

[10] *In re Snell*, L. R., 5 Ch. D., 815 *Re Beavan*, 20 Beav., 146

[11] *Duncan* v. *Lowndes*, 3 Camp., 478

[12] *Arthur* v. *Barton*, 6 M. & W., 138.

[13] *Gunn* v. *Roberts*, L. R., 9 C. P., 331.

[14] *Webster* v. *Seekamp*, 4 B. & Ad., 352. *The Sophie*, 1 W. Rob., 368 *The Alexander*, 1 Dodson, 278, 1 W. Rob., 346. *The Riga*, L. R., 3 A. & E., 516.

the ship.[1] He may sign the bill of lading, and in doing so, he generally acts as the agent of the owners,[2] but in some cases he acts on these occasions as agent of the charterers;[3] but he has no authority to sign a second bill of lading for the same goods;[4] nor has he any authority to vary the contract the owner has already made, by signing bills of lading differing from the charter.[5] Nor for a greater quantity of goods than is on board,[6] nor for goods not on board;[6] nor for a lower rate of freight than that for which the owner has contracted.[7] He may, in cases of necessity, when the ship is wrecked or disabled, and cannot be repaired, procure another vessel to carry on the cargo and earn the freight;[8] he has not in general an implied authority to effect an insurance on either the ship, freight or cargo,[9] yet there seems little doubt that cases may arise which would confer that authority on him.[10] He may in cases of necessity only, hypothecate the ship, freight, or cargo; but only when he has no other means of obtaining money and after using every endeavour to communicate with the owners of both ship and cargo.[11] His right so to act is founded on necessity; this power of the master arises out of his relation as agent both to the owner of the ship and to the owner of the cargo. A material distinction, indeed, exists between his authority as agent for the one and as agent for the other, but in both cases his power to hypothecate, arises out of necessity of the case. Lord Stowell says, "necessity creates the law; it supersedes the rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as a matter of surprise therefore, if much instituted rule is not found on such subjects ..... several limitations of that authority, as the law has been developed, have been established; amongst them the following are pre-eminent. The master must endeavour to raise funds on the personal credit of the owners ..... and if the owner be on the spot, according to the general law the master has no authority to bottomry (Boulay Paty, 11, 271); and if

[1] *Bayley* v. *Taruknath Poramanic*, *Bourke*, (O. C. J.), 263. *Proceeds of the "Albert Crosley,"* L R, 3 A & E, 37.

[2] *Dods* v. *Stewart*, 8 B L. R., 340, 346 *Wagstaff* v. *Anderson*, L. R, 5 C. P., 171, (180). *Sandeman* v. *Scurr*, L R., 2 Q B., 86, (87)

[3] *Marguand* v. *Banner*, 6 El. & El., 232. *Hassonbhoy Visram* v. *Clapham*, I. L. R., 7 Bom., 51, (70). *Dods* v. *Stewart*, 8 B. L. R., (344). But see *Gilkison* v. *Middleton*, 2 C. B. N. S., 134, (154).

[4] *Hubbersty* v *Ward*, 8 Ex., 330.

[5] *Rodoconachi* v. *Milburn Bros.* L. R., 17 Q. B. D., 317.

[6] *Grant* v. *Norway*, 10 C. B., 664. *McLean* v. *Flemming*, L. R., 2 H. L. Sch., 128

[7] *Pickernell* v. *Jaubert*, 3 F. & F., 217.

[8] *Notara* v. *Henderson*, L. R., 7 Q. B, 225, 16 C. B. N. S., 772.

[9] *Crawford* v. *Hunter*, 8 T. R., 23.

[10] See *Arnould on Marine Insurance*, Vol. II., p. 163, and the cases there cited

[11] *The Gratitudine*, 3 Rob., 255. *The Karnac.*, L. R., 4 A. & E., 283, (309)

the owner be absent, it is the duty of the master to communicate with him before bottomry be resorted to. The money must be to defray the expenses of necessary supplies or repairs of the ship, or to enable—and this it will be seen is a wider and more difficult proposition—the ship to leave the port in which he gives the bond, and to carry the cargo to its destination; with reference to this proposition much discussion has arisen whether the liability of a ship to detention, according to the *lex loci*, justifies a master in giving a bottomry bond, and the authorities upon this point are supposed to be conflicting. And again there arises a question whether the liability to detention must not be on account of necessaries furnished to the ship in order to enable her to prosecute her homeward voyage, or whether this liability may arise from any other cause, such as for old debts incurred antecedently to the voyage, or for damages done to the outward cargo in unloading at the port, or in some other manner; and again, whether the liability of the master to personal detention justifies the creation of the bond. Another important principle established by the judgments is sometimes expressed in this language—that the money must have been advanced in contemplation of a bottomry security, or in other words, 'upon the credit of the ship' (*The Alexander*, 1 Dodson, 278). This proposition appears to me to be somewhat loosely stated, for apart from verbal or written statement or agreement, it would seem difficult to prove whether the lender or the borrower did, or did not, mentally contemplate hypothecation at the time when the expenses were incurred."[1] The existence of necessity to hypothecate by bottomry is to be ascertained by evidence in the usual manner; and the meaning of the term "necessity," in respect of hypothecation by the master, is analogous to its meaning in other parts of the law.[2] But the master has no authority to hypothecate to obtain the release of the ship seized and detained on a matter of account between the parties to the bond.[3] It has been held that he has authority to hypothecate by bottomry even to the agents of the mortgagees of the ship, who gave unusual and better terms than could have been obtained elsewhere;[4] but he cannot hypothecate by a bottomry bond proposing to charge subsequent freight.[5] He has power to sell the cargo, but to justify him in so dealing with the cargo, he must establish a necessity for the sale; and inability to communicate with the owner and obtain his instructions;[6] he may, as agent of the cargo owners jettison goods in cases of necessity;[7]

[1] *The Karnak*, L. R., 2 A. & E., 289, (299, 300), per Philimore J.; approved as far as the cargo was concerned by L. R., 2 P. C., 505

[2] *Droege* v. *Suart*, (*The Karnak*), L. R., 2 P. C., 512

[3] *The Ida*, L. R. 3 P. C., 542.

[4] *Smith* v. *Bank of New South Wales The Staffordshire*, L. R., 4 C. P., 194, (205).

[5] *Ibid*, (210)

[6] *Australasian Steam Navigation Co* v. *Morse*, L. R., 4 P. C., 222, (228)

[7] *Burton* v. *English*, L. R., 12 Q. B. D., 218, (223).

and has implied authority to enter into salvage agreements.[1] He has power even to sell the ship when it is absolutely necessary for him to do so,[2] but the case referred to however, was decided on the ground of ratification of the sale; but as pointed out in the judgment the authorities give this power to the master in cases of actual necessity.[3] And his power to do so, even if affecting the assurers, is allowed under circumstances of very stringent necessity;[4] but he cannot sell, so as to extinguish all mortgage claims and all liens on bottomry or wages, even in a case of necessity.[5] He has no authority as master, to agree to a substitution of another voyage in the place of one agreed upon between the owners and the freighters and on which he has sailed to a foreign country.[6] He has no authority to bind the owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorizing the broker to charter the ship.[7] He has been held authorized to promise, on behalf of the owners when the ship was taken, to pay monthly wages to one of the sailors in order to induce him to become a hostage;[8] but when in a foreign port and it is not possible to communicate with his owners, he has implied power to charter;[7] and lastly the authority of the master to bind his owners is governed by the law of the country to which the ship belongs.[9]

Authority of betting agent.—A commission agent or book maker when authorized to make a bet has implied authority to pay the same if lost, if his not doing so world entail disagreeable consequences on himself.[10] As to such agent's authority to pay the debt, and his right of suit against his principal when he has so paid it, the following cases may be referred to, *Tribhubandas Jagjivandas* v. *Motilal Ramdas*,[11] *Read* v. *Anderson*[10] and the remarks of Manisty J., on the latter case in *Cohen* v. *Kittwell*,[12] and *Britton Cook*.[13]

Commission agent.—A commission agent in commercial affairs to whom funds are remitted to purchase and ship goods has not as a general rule any implied authority to insure his principal's goods, but exception may be created by circumstances. An established course of dealing between himself and his

[1] *The Renpor*, L. R., 8 P. D., 115.

[2] *Hunter* v. *Parker*, 7 M. & W., 322

[3] See *Idle* v. *Royal Exchange Assurance Co.*, 8 Taunt 755, (772). *Robertson* v. *Clarke*, 1 Bing., 445 *Cambridge* v. *Anderson*, 2 B. & C, 691, (693)

[4] *Cobequid Marine Insurance Co.* v. *Barteaux*, L R, 6 P C., 319

[5] *The Catherine*, 15 Jur., 232

[6] *Burgon* v. *Sharpe*, 1 Camp, 529.

[7] *The Fanny*, 48 L T., 771.

[8] *Yates* v. *Hall*, 1 T. R, 73.

[9] *Lloyd* v. *Guibert*, L. R, 1 Q. B, 115. *Missouri Steam Ship Co.*, L R. 42 Ch D. 321.

[10] *Read* v. *Anderson*, L. R., 13 Q B D, 779, L. R, 10 Q B. D., 100

[11] 1 Bom H. C., 34.

[12] W. N., 1887.

[13] L. R., 22 Q. B. D., 680.

principal, or the usage of any particular port or trade, may be reasonably held to confer an implied authority to insure.[1]

Auctioneers.—An auctioneer may make a contract of sale of goods in his own name,[2] and can sue the purchaser from the price,[3] where the right of no third person intervenes;[4] he may maintain an action against a person taking goods out of his possession.[5] And, in common with all agents for sale, has, in the absence of advice to the contrary, authority to receive the proceeds of sale,[6] but only in cash in the absence of any practice or custom to the contrary.[7] Where it is customary he may receive the deposit by means of a cheque.[8] If he is employed to sell goods for ready money, he has power to receive the money,[9] he cannot however deviate from the strict terms of the conditions of sale;[10] he has no implied power to receive more than the deposit;[11] nor has he authority to receive payment by bill of exchange;[12] but he may take a cheque in lieu of cash;[13] he has implied authority to bind the vendor by his signature, and so also can he bind the bidder.[14] He may adjourn the sale from time to time, but he is not bound to adjourn simply because a person sends him notice to say he is ready to make a higher bid than that of the highest bidder.[15]

Brokers.—A broker has authority as agent of both vendor and purchaser to sign the contract made by him as agent;[16] there being nothing to prevent him from acting as agent for both parties on those points where their interests are the same; but he must, where such is not the case, act as agent for one party exclusively.[17] He, however, has no authority to contract in his own name,[18] or to delegate his duties to another without express authority;[19] nor to receive the

[1] See *Lindsey* v. *Gibbs*, 4 Jur., N. S., 779; 28 L. J. Ch., 602. *Green* v. *Briggs*, 6 Hare, 395. *Alexander* v. *Simms*, 23 L. J. Ch., 721. See as to agents to purchase, *Mullens* v. *Miller*, L. R., 22 Ch. D., 194.

[2] *Williams* v. *Millington*, 1 H. Bl., 81.

[3] *Robinson* v. *Rutter*, 4 El. & Bl., 954.

[4] *Dickenson* v. *Naul*, 4 B. & Ad., 638.

[5] *Holmes* v. *Tutton*, 5 El. & Bl., 65.

[6] *Capel* v. *Thornton*, 3 C. & P., 352. *Sykes* v. *Giles*, 5 M. & W., 645.

[7] *Catterall* v. *Hindle*, L. R., 1 C. P., 186. *Williams* v. *Evans*, L. R., 1 Q. B., 352. *Williams* v. *Sykes*, L. R., Q. B., 352.

[8] *Farrer* v. *Lady Hartland*, L. R., 25 Ch. D., 637, (642).

[9] *Sykes* v. *Giles* (*arguendo*, per Parke B.), 5 M & W., (650).

[10] *Jones* v. *Nanney*, 13 Pr., 76.

[11] *Sykes* v. *Giles*, 5 M. & W., 645.

[12] *William* v. *Evans*, L. R., 1 Q. B., 352; *Sykes* v. *Giles*, 5 M. & W., 645.

[13] *Farrer* v. *Lacy*, L. R., 31 Ch. D., 42, (48). *Bridges* v. *Garrett*, L. R., 5 C. P., 451.

[14] *Bartlett* v. *Purnell*, 4 Ad. & El., 792; *Emerson* v. *Heelis*, 2 Taunt., 38.

[15] *Govind Hari Walekar* v. *Bank of India*, 4 Bom. H. C., (O. C. J.), 164.

[16] *Powell* v. *Edmunds*, 12 East., 6.

[17] *Thomson* v. *Gardiner*, L. R., 1 C. P. D., 777.

[18] *Baring* v. *Corrie*, 2 B. & Ald., 137.

[19] *Cockran* v. *Irlam*, 2 M. & S., 301 *Henderson* v. *Barnewell*, 1 Y. & J., 387.

proceeds of a sale negociated by him;[1] nor to vary the contract of sale;[2] nor can he sue in his own name on contract made by him;[3] He has authority to contract according to the usage of trade[4] and do everything necessary within the scope of his authority to carry out the contract. He has authority to act according to the usage of trade, such usages being tacitly incorporated in the contract, though not expressed in it, provided the express terms of the writing are not so inconsistent with the usages so as to exclude them and to change the intrinsic character of the contract.[5]

Insurance Brokers.—An insurance broker has authority as agent of the underwriter to adjust a loss on a policy where he has authority to subscribe it.[6] He may as agent of the assured effect a policy in his own name;[7] he may when the policy is left in his hands adjust and receive payments in cash for any return of praemium or any loss on a policy effected by him.[8] He may sell in his own name.[9] He has no authority to pay a loss;[10] but under certain circumstances he may refer to arbitration a dispute concerning a loss.[11] He has no power to depute another to act for him,[12] neither has he power to cancel a policy.[13]

Ship's Broker.—The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is to be carried, does not give them implied power to relieve the master, when he signs the bill of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bill of lading.[14]

Part owners of ships.—Part ownership is but a tenancy in common; and one part owner has no general authority to bind his co-partners for repairs to a ship; but it is a question of fact whether or no he has express and implied authority given to him.[15] Nor has he power to insure without authority from his co-owners so as to bind them.[16]

[1] *Baring* v. *Corrie*, 2 B. & Ald., 137.
[2] *Pitts* v. *Beckett*, 13 M. & W, 743. *Jardine Skinner* v. *Nathoram*, Bourke, 43.
[3] *Fairlie* v. *Fenton*, L. R., 5 Ex., 169.
[4] *Dingle* v. *Hare*, 7 C. B. N. S., 145.
[5] *Robinson* v. *Mollett*, L. R., 7 H. L., 811.
[6] *Richardson* v. *Anderson*, 1 Camp., 43, note (*a*)
[7] *Lloyd's* v. *Harper*, L. R., 16 Ch. D., 290, 321
[8] *Shee* v. *Clarkson*, 12 East 507, (511). *Todd* v. *Reid*, 4 B & Ald., 210.
[9] *Baring* v. *Corrie*, 2 B. & Ald, 137.
[10] *Bell* v. *Auldjo*, 4 Doug., 48.
[11] *Goodson* v. *Brooke*, 4 Camp., 163.
[12] *Cockran* v. *Irlam*, 2 M. & S., 301. *Xenos* v. *Wickham*, L. R., 2 H. L., 296.
[13] *Xenos* v. *Wickham*, L. R., 2 H. L., 296, (309).
[14] *Stumore, Weston & Co.* v. *Breen*, L. R., 12 App. Cas., 698.
[15] *Brodie* v. *Hastie*, 17 C. B., 109; 25 L. J., C. P., 57.
[16] *Chappell* v. *Bray*, 30 L. J. Ex., 34. 6 H. & N., 145. *French* v. *Backhouse*, 5 Burr., 2728. *Robinson* v. *Gleadow*, 2 Bing. N C., 156.

Trustees.—A discretionary power given to trustees to invest and lend any part of the estate to the testator's firm does not imply a power for the trustees to sell the real estate.[1] He is, however, justified in accordance with the usual course of business or in cases of moral necessity in employing agents in the administration of the trust funds;[2] but such agents must not be employed out of the ordinary scope of their business.[3]

Husband and Wife.—The wife has, under certain circumstances, implied authority to bind her husband for necessaries. Where the husband and wife are living together, the presumption is, that she has his authority to bind him by her contract for articles suitable to that station in life which he permits her to assume, but this presumption may be rebutted by showing that she had not such authority.[4] This presumption holds good also in the case of a mistress who lives with a man and passes for his wife, and this whether or no the person supplying the articles was or was not aware of the relation existing between them.[5] Where the husband neither does, nor assents to, any act to show that he has held out his wife as his agent to pledge his credit for goods supplied to her order, the question whether she bears that character must be examined upon the circumstances of the case.[6] In *Debenham* v. *Mellon* the husband and wife were living together as the manager and manageress of an hotel, their board and lodging being found for them by the Hotel Company, the husband making his wife an allowance of £52 a year (on some occasion increased to £62) to enable her to supply herself and children with all necessary clothes, and positively forbidding her not to exceed that allowance. The wife obtained clothes on the credit of the husband. As to whether the husband was liable, Bramwell L. J., in the Court of Queen's Bench[7] said, "No statute, no unvarying rule of the Common law, provides in what cases a husband shall or shall not be liable, but he is treated as a debtor or a person liable on a contract to pay, his obligation depending on what used to be called an assumpsit, and the endeavour on the part of the tradesman is to show that the wife was the agent of the husband to pledge his credit at the time the debt was contracted . ... When a wife is living with her husband, if he gives her nothing but the shelter of his house, she would have a right to provide food and apparel for herself at his expense, and he would be bound to pay for them. In cases such as these, a wife has a similar power when she and her husband are co-habiting together, and where the article

[1] *In re Holloway*, W. N. (1888), 206.

[2] *Ex-parte Belcher*, Ambl, 218 *Speight* v *Grant*, L R, 9 App. Cas, 1.

[3] *Fry* v. *Tapson*, L. R, 28 Ch. D., 268

[4] *Jolly* v. *Rees*, 15 C. B. N. S, 628. *Debenham* v. *Mellon*, L. R, 5 Q. B D, 398.

[5] *Watson* v. *Threlkeld*, 2 Esp., 637.

[6] *Debenham* v. *Mellon*, L. R., 6 App. Cas, 24.

[7] L. R., 5 Q. B. D,

bought upon credit is of such a kind and character that persons living in the same neighbourhood, are in the habit of ordering it upon credit." In the House of Lords, Lord Selbourne in the same case[1] said:—"According to all the authorities there is no such mandate in law" (making the wife an agent to pledge her husband's credit) "from the fact of marriage only, except in the particular case of necessity; a necessity which may arise when the husband has deserted his wife, or has by his conduct compelled her to live apart from him, without providing for her, but not when the husband and wife are living together, and when the wife is properly maintained; because there is, in that state of circumstances, no *primâ facie* evidence that the husband is neglecting to discharge his necessary duty, or that there is any necessary occasion for the wife to run him into debt, for the purpose of keeping herself alive, or supplying herself with lodging or clothing; I therefore lay aside that proposition; and thinking it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present to consider, I pass to the next question, whether the law implies a mandate to the wife, from the fact, not of marriage, but of co-habitation? If it does, on what principle? Co-habitation is not (like marriage) a status, or a new contract; it is a general expression for certain condition of facts If therefore, the law did imply any such mandate from co-habitation; it must be an implication of fact, and not as a conclusion of law" Lord Blackburn said;—"I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he entrusts her with such authorities as are commonly and ordinarily given by husband to wife .. In the ordinary case of the management of a household, the wife is the manager of the household and would necessarily get short and reasonable credit on butcher's and baker's bills and such things; and for these she would have authority to pledge the credit of her husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give the wife such authority; but even then, I do not think the authority would arise, so long as he supplied her with the means of procuring the articles otherwise"

Where the wife lives apart from her husband the presumption is that she has not authority to pledge his credit even for necessaries,[2] but such presumption is of course liable to be rebutted And it appears that the husband need not, in order to save himself from liability in such case, notify to the world that he has not given credit,[3] *a fortiori* will he not be held liable if he has given express notice to tradesmen of his refusal to allow credit.[4] The wife has no power to pledge

[1] L R, 6 App Cas., 24, (31).

[2] *Johnson* v. *Sumner*, 3 H & N., 261. *Eastland* v. *Burchell*, L. R., 3 Q. B. D., 432.

[3] *Wallis* v *Biddick*, 22 W. R., (Eng), 76.

[4] *Etherington* v. *Parrot*, 1 Salk., 118.

her husband's credit where she is living with another man, and the husband is paying her a sufficient allowance.[1] But she may pledge his credit where a promised allowance is not paid.[2] And it seems that her power so to do is not lost by adultery, whilst living with her husband.[3] And she may pledge his credit for necessaries when living apart from him by mutual consent if he does not allow her a sufficient allowance,[4] except when there is a special agreement between husband and wife, when it appears that the adequacy of the allowance need not be considered.[5] She may also do so when her husband deserts her,[6] or drives her from his home.[7] The rule deduced from the case law by the learned annotators of Smiths Leading Cases is that where the husband and wife separate *by mutual consent*, the husband will (under ordinary circumstances, and in the absence of any express revocation of her agency) be liable, unless he *allow* and *pay* her a sufficient maintenance.[8] And it has now been decided that no proof of notice to the tradesman giving credit to the wife, of the fact that the wife has an allowance, is necessary.[9]

Hindu wife.—A Hindu wife has no implied authority to pledge her husband's credit, save under circumstances of pressing necessity,[10] and where she has voluntarily separated herself from her husband without justification she has no authority to pledge his credit even for necessaries.[11] A right of a somewhat analogous character although arising on different grounds is the right which a Hindu possesses to maintenance. But ordinarily this right to maintenance does not rest upon contract, it is a liability created by the Hindu Law, arising out of the jural relation of the Hindu family; and is enforceable in numerous instances in which there is no connection with contract. For example, a Hindu personally disqualified from inheritance by congenital blindness, or deafness, or dumbness, or insanity, or idiotcy, or sanious leprosy, or illegitimacy, is entitled to be maintained out of the family estate by the next heir who takes it. This liability of the husband to maintain his wife is however an obligation arising out of the status of

[1] *Atkyns* v. *Pearce*, 2 C. B N. S., 763 *Hodgkinson* v. *Fletcher*, 4 Camp, 70.

[2] *Beale* v. *Arabin*, 36 L. T., 249.

[3] *Needham* v. *Bremner*, L. R., 1 C. P., 583

[4] *Hodgkinson* v. *Fletcher*, 4 Camp, 70

[5] *Eastland* v. *Burchell*, L. R, 3 Q. B. D., 432.

[6] *Emery* v. *Emery*, 3 1 Y. & J., 501.

[7] *Rawlyns* v. *Vandyke*, 3 Esp., 251. *Howliston* v. *Smith*, 3 Bing. 127.

[8] *Manley* v. *Scott*, 2 Smiths, L C, 530, (9th ed.).

[9] *Misen* v. *Pick*, 3 M. & W., 481. See also *Clifford* v *Laton*, Moo. & M., 102, and *Reeve* v. *Conyngham*, 2 C. & K., 446.

[10] *Pusi* v. *Mahadeo Prasad*, I. L. R., 3 All, 122.

[11] *Nathubhai Bhailal* v. *Javher Rayi*, I. L. R., 1 Bom, 121 *Viraswami Chetti* v. *Appasami Chetti*, 1 Mad. H. C., 375.

marriage amongst Hindus, expressly imposed by their law,[1] and forms no part of the law of principal and agent.

Karnavan.—A *Karnavan* of a tarwad has an implied authority singly to create incumbrances binding on the family property, *a fortiori* he has a right to contract single debts which will bind the family; but he is not the agent of the family to make alienations, but must have special authority in each case. As manager of the property he has power to pledge the credit of the family for necessary purposes.[2]

Factors.—A factor may buy or sell in his own name for another as apparent owner,[3] he has authority to sell on credit according to the usage or trade;[4] he may (under Statute) make a pledge of goods or documents of title in his possession,[5] he may receive payment and give discharges for the price of goods sold, but only in the manner warranted by the course of trade,[6] he has an authority to sell for money, but not to barter;[7] he may, if he buys goods, for and on account of his principal, with his own money, and on his own credit, exercise the right of stoppage in transitu.[8]

Insurance Agents.—An insurance agent is a limited agent not a general agent, and has no authority to contract for the Company;[9] nor can the local agent of an Insurance Company without special authority[10] bind the Company to grant a policy,[11] or bind them as to the terms of a policy;[12] or waive a forfeiture.[13] Nor can he novate even though the praemium is paid to him[9]; he may not delegate though it appears he may appoint sub-agents.[10]

Authority of certain other agent; Agent of pre-emptor.—Under Mahomedan law a husband has authority to make the immediate claim to a right of pre-emption on behalf of his wife, and so may it seems any agent or manager,[14]

[1] *Sidlingapa* v *Sidava Kom Sidlingapa*, I. L. R., 2 Bom., 64.

[2] *Kombi* v. *Lakshmi*, I. L. R., 5 Mad., 201, (206-7).

[3] *Baring* v. *Corrie*, 2 B. & Ald., 137, (143).

[4] *Scott* v. *Surman*, Willes, 400 (407) *Houghton* v. *Mathews*, 3 Bos. & P., 489.

[5] Ind. Contr. Act, s 178, (which embodies Act XX of 1844 now repealed; per Garth C. J. *Biddomoye Dabee* v. *Sittaram*, I. L. R., 4 Calc., 499). *Gobindchunder Sein*, v. *Administrator General*, 1 W. R. P. C., 43

[6] *Hornby* v. *Lacy*, 6 M. & S., 166.

[7] *Guerreiro* v. *Peile*, 3 B. & Ald., 616.

[8] *Feise* v. *Wray*, 3 East, 93.

[9] *Acey* v. *Fernie*, 7 M. & W., 151. Crawl. on Ins., 197.

[10] *Rossiter* v. *Trafalgar Insurance Co.*, 27 Beav., 377.

[11] *Lunford* v. *Provincial Insurance Co.*, 34 Beav., 291.

[12] *Fowler* v. *Scottish Equitable Land Assurance Co*, 28 L. J. N. S. Ch., 225.

[13] *Acey* v. *Fernie*, 9 M. & W., 151; but see *Wing* v. *Harvey*, 5 DeG., M. & G., 265.

[14] *Abadi Begam* v. *Imam Begum*, I. L. R., 1 All., 521.

any act or omission on the part of a duly authorized agent having the same effect upon pre-emption as made by the pre-emptor himself.[1]

Counsel.—The relation between Counsel and client is peculiar. It is not analogous to any case of principal and agent. The Counsel has a duty to the Court as well as to his client. In *Colledge* v. *Horn*,[2] Best C. J., said;—"I cannot allow that the Counsel is the agent of the party." Pollock C. B., also says:—"I think an advocate ought to follow his own judgment; he is not an agent."[3] And the same view is taken by in *Mathews* v. *Munster*.[4] As to his power to compromise, see the cases above referred to, and *Carrison* v. *Rodriges*.[5]

Pleaders—Vakils.—A pleader or vakil has been defined by the High Court as including any legal practitioner entitled to practice before a Judge, not being an advocate or attorney.[6] He acts under a *vakalutnamah* and thereunder ordinarily he has authority to withdraw a case, or to agree to issues,[7] but has no authority to give up a portion of a claim already decreed,[8] he has no authority to enter into special arrangements as to his fees after accepting a vakalutnamah;[9] he may receive on behalf of his client money or valuable documents.[10] He has authority to bind his client by admissions in civil cases;[11] but not so in criminal;[12] he has, if a mofussil practitioner, been held by Jackson J., in the year 1866 to have no authority to bind his client by admissions of law;[13] he has authority to bind his client by admissions of fact;[14] but admissions made by him must be taken as a whole, and must not be unduly pressed,[15] he has no authority to relinquish part of his client's claim[16] or his client's

[1] *Harihar Dat* v. *Sheo Prasad*, I. L. R., 7 All., 41.

[2] 3 Bing., 119, (121).

[3] *Swinfen* v. *Lord Chelmsford*, 5 H. & N., 890, (907).

[4] L R., 20 Q. B. D., 141.

[5] 1. L. R. 13 Calc., 115.

[6] Rule No. 271. See *Belchambers Practice*, p. 545.

[7] *Subitramonee* v. *Mudhoo Soodun Sing*, Marsh. 519. See s. 147, Act XIV of 1882.

[8] *Abdul Subhan Chowdhry* v. *Shibkisto Daw*, 3 B. L. R., 15 Ap.

[9] *Ramchandra Chintaman* v. *Kalu Raju*, I. L. R., 2 Bom., 362. But see *Shivram Hari* v. *Arjun*, I. L. R., 5 Bom., 258.

[10] *Anonymous Case*, I. L. R., 3 Calc, 767.

[11] *Berkeley* v. *Chittur Kooar*, 5 N. W. P. H. C., 2. *Narain Roy* v. *Sreenath Mitter*, 9 W. R. 485; *Rajender Narain Rae* v. *Bijai Govind Sing*, 2 Mos. I. A, 253; *Dossee* v. *Pitambur Pundah*, 21 W. R, 332; *Kalekanund Bhuttarjee* v. *Girabala Debia*, 10 W. R., 322.

[12] *Queen* v. *Kazim Mundle*, 17 W. R. Cr., 469.

[13] *Jushoda Koonwur* v. *Gowree Byjnath Pershad*, 1 Ind. Jur. N. S, 365.

[14] *Abdool Gunnee* v. *Gour Monee Debia*, 9 W. R, 375.

[15] *Natha Singh* v. *Jodha Singh*, I. L. R., 6 All., 406.

[16] *Ram Kant Chowdhry* v. *Brindabun Chunder Doss*, 16 W. R., 246. *Chunder Coomar Dev* v. *Sudakut Mahomed Khan*, 18 W. R., 436. *Gour Pershad Doss* v. *Sookdeb Ram Deb*, 12 W. R., 279.

defence,[1] nor can he, without his client's consent, compromise a suit,[2] nor can he consent so as to bind his client with reference to matters beyond the scope of the suit,[3] nor has he authority to transfer a decree, unless specially empowered;[4] but he has authority to apply for leave to withdraw a suit;[5] this power is now given by s 378 of Act XIV of 1882, but the withdrawal must be with the permission of the Court; he has also authority to carry out all ministerial functions through his clerks or taids.[6]

Agents of Government—The act of a Government officer binds the Government only when he is acting in discharge of a certain duty within the limits of his authority, or if he exceed that authority, when the Government in fact, or in law, directly, or by implication ratifies the contract.[7]

[1] *Hakeemoonnissa* v. *Buldeo*, 3 Agra H. C., 309

[2] *Prem Sookh* v. *Purthee Ram*, 2 Agra H C, 222 *Sirdar Begum* v. *Izutoolnissa*, 2 N. W. P. H. C., 149.

[3] *Avul Khadar* v. *Andhu Set*, 2 Mad. H. C., 423

[4] *Mohur* v. *Jaffer Hossein*, 2 N W. P. H. C., 195.

[5] *Ram Coomar Roy*, v *Collector of Beerbhoom*, 5 W R, 80

[6] *In the matter of Khoda Bux*, I. L. R, 15 Calc, 638.

[7] *Collector of Masulipatam* v *Cavala Vencata Narrainapah*, 8 Moo I. A., (519), *Rundle* v. *Secretary of State*, 2 Hyde, (46).

LECTURE VI.

PART I. THE EXERCISE OF THE AUTHORITY.

PART II. CONSTRUCTION OF THE AUTHORITY.

I. Agent how should act—Authority to be strictly pursued—Effect of exercise with a variation—Effect of exceeding the authority—Effect of doing less than authority—Time of exercising the authority—Under power of attorney—Verbal authority to sign—Exercise as to negotiable instruments—Promissory notes—Mere words of description—Exercise by Companies—Bills of Exchange for, and by Companies—Must be for business of Company—Mode of execution under Companies Act—Of Bills by and for private persons—Effect of custom—Ambiguity as to whom bill is addressed—Where no qualification—Exercise of the authority in case of charterparties—In cases of bought and sold notes—Instance of particular custom—Same rules in exercising authority in other contracts—Effect of Bought and Sold notes—Sufficiency in form of signature.

II. Construction of the authority—Where the authority is by formal document—Special purpose first to be regarded, general words following special purpose to be regarded as being all such powers as are needful—Power to sell, endorse and assign. Recital controlling operative part of agreement—Construction of general words—Words to be looked at in connection with context as well as with general objects of power—Words "*per proc*" effect of—Where by less formal instrument—Only such matters are within scope of authority—How construed when authority is oral or implied—Where contract is ambiguous. Evidence when admissible to construe contract.

PART I.

Execution of the authority.—It is the duty of the agent when acting on behalf of his principal to use care in the mode of execution of all contracts entered into on that behalf, his object should be to so contract as to bind, not himself, but his principal to third parties, and conversely third parties to his principal, and not to himself. He should also use care that he is acting strictly in pursuance of the authority given to him; although it may be, as will be seen, that a slight deviation or variation either in excess of the authority or by doing less than the authority warrants, may not be a mode of execution of his authority which will prove fatal to the contract But nevertheless in considering this, it will be well to bear in mind the rule that the authority includes as incidental to it, all things necessary and customary to carry it into effect.

First, the authority should be strictly pursued – As a general rule the authority must be strictly pursued.[1] For authorizing a man to do an act in a particular way implies a negative that he shall do it in any other way, if any consequences might ensue from doing it in one way, which might not from doing

[1] Com. Dig., "Attorney," C. 11. *Coombe's* case, 9 Co., 76, *b*.

it in the other. Thus, authorizing a man to raise money out of rents and profits of an estate by leasing it, does not authorize him to raise it by mortgage.[1] So an authority to sell by public auction will not allow of a sale by private contract, for such a sale is not made pursuant to the authority.[2] But although the general rule is so, and applies equally to cases in which there are more agents than one,[3] yet it is not every deviation from the authority which will vitiate the contract, for the agent is possessed of, as has been stated, all such incidental powers as are necessary and customary for the carrying out of the work of the agency; and further than this, as will be next seen, an immaterial variation, in substance within the authority, will not have that effect.

Effect of exercising the authority with a variation—The variance, to affect the authority, must be material and substantial, and not only circumstantial.[4] Thus an agent at a foreign port to whom a ship is addressed for loading under a charterparty, has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo.[5] So where an agent who was instructed to enter into a contract for the delivery of cotton at the end of Kartic, but the agent contracted for the delivery of the cotton by the middle of the month of Kartic. The Court held that there the contract varied substantially from the contract, and that there was good reason for fixing the end of Kartic, as in the event of a late rainy season the principal might have been seriously prejudiced if he had been obliged to make delivery by the middle of the month, and of this the agent was well aware as his letter of instructions ran "I will deliver at Kampti by the end of the month of Kartic. It cannot be supplied in the month, for should the rain fall continually, the time will be lost."[6] The following examples of a variance are given in Mr. Kent's Commentaries. If the agent does a different business from that he was authorized to do, the principal is not bound, though it might be more advantageous to him, as if he was instructed to buy such a house of A, and he purchased the adjoining house of B, at a better bargain, or if he was instructed to have the ship of his correspondent insured, and he insured the cargo; the principal is not bound because the agent departed from the subject matter of the instruction.[7]

[1] *Ivy* v. *Gilbert*, 2 P. Wms, 13, 18, 19.

[2] *Daniel* v. *Adams*, 1 Ambl., 495.

[3] 3 Bacons. Abr., 612. Co. Litt, 49. 2 Rolls Abr., 8, 326. Co. Litt., 181., *b*. See Co Litt., 52, *b*, note (*a*) 13th ed. *Brown* v. *Andrew*, 13 Jur, 938. *Guthrie* v. *Armstrong*, 5 B. & Ald., 628; 1 D. & R, 248, and pp 38, 39, *supra*.

[4] *Parker* v. *Kett*, 1 Salk., 96, Co. Litt., 49, *b*, 303, *b*, (note *s*).

[5] *Sickens* v. *Irving*, 7 C B. N. S., 165,

[6] *Arlapa Narayan* v. *Nasrsi Keshavji*, 8 Bom. H C., 19.

[7] 2 Kent's Comm. Lect., 41, p. 822, (11th ed).

Effect of exceeding the authority—Where the agent in exercising [the authority, does *more* than he is authorized, in such case, where it is possible to separate that which is beyond the authority from that which is within it, so much only of what he has done as is within the authority is binding as between him and his principal; but where no such separation is possible, the principal will not be bound to recognize the transaction.[1] Thus in *Baines* v. *Ewing*[2] an insurance broker was instructed to underwrite policies, risk not to exceed £100 by any one vessel; and the broker underwrote a policy for £150, the Court held that the broker had exceeded his authority, and that the contract was not capable of division, and that therefore the principal was not liable to the extent of even £100. So where a firm of carriers authorized one of their partners to draw bills on the firm to the extent of Rs 200 each; and the partner made two promissory notes in the name of the firm for Rs. 1,000 each, and the lender knew that the partner was limited in his authority, but also knew that on other occasions the partner had drawn bills for Rs 300 which had been previously accepted by the firm; in an action on the notes, *held first* that the firm was not liable for the whole amount drawn, and secondly, that the contract whereon the action was founded, was not capable of division, and therefore the firm was not liable to the extent of Rs 200.[3] Nevertheless an excessive exercise of the authority will be binding on the principal if he has induced third parties to believe that the agent was acting within the scope of his authority in so doing.[4]

Effect of doing less than authorized—Where in exercising the authority the agent does less than he is authorized, the old rule, laid down in Coke, seems to apply, there it is said "regularly it is true that where a man doth lesse than the commandement or authority, there the commandement or authority being not pursued, the act is void," but to this rule exceptions are made, and one exception there laid down, is, the case of a decrepit man directing his servant to make a claim on land, and the servant through fear does not go directly upon the land itself, but as near thereto as he dare, in such case it is said, "where a servant doth lesse than he is commanded, yet it sufficeth for that *impotentia excusat legem*, for seing that the master cannot, and the servant dare not, enter into the land, it sufficeth that he come as neare to the land as he dare";[5] but otherwise where there is no such excuse.[6] Where the authority given is to

[1] Ind. Contr. Act, ss. 227, 228 *Alexander* v *Alexander*, 2 Ves, 640, (644) See also 1 *Bacon's Abridg* "*Authority*," 435

[2] L. R, 1 Ex., 320, (323).

[3] *Premabhai Hemabhai* v *Brown*, 10 Bom H C, 319.

[4] Ind Contr. Act, s 237

[5] Co Litt, 258 (*a*).

[6] Co Litt., 258 (*b*).

do a thing absolutely and the attorney doeth it conditionally, the act will be good and the unauthorized condition void.[1]

Time of exercising the authority.—The time at which the agent should exercise the authority depends on the construction of the authority, and where there is nothing imperatively binding as to time in the authority, it appears that the reasonable convenience and opportunity of the agent may be considered. Thus it has been held in *Roe* v. *Rashleigh*[2] following *Freeman* v. *West*,[3] that where a power of attorney authorized the delivery of seisin in accordance with the form and effect of a deed, it was unnecessary for the attorney to make livery on the day of the date of the deed, but that he could do so at some convenient opportunity afterwards. There the defendant had granted certain premises to one Dingla (represented in the suit by the plaintiffs, his assignees in bankruptcy) by a deed dated 29th September 1790, from the date thereof for his life; the lease contained a power of attorney to deliver seisin "according to the form and effect of these presents." Livery of seisin was made by the attorney on the 11th January 1791. In a suit brought in ejectment, it was contended that under the circumstances, the lease was not good inasmuch as livery of seisin could not be made by attorney on a day subsequent to the date of the lease, unless the attorney was specially authorized to do so, which he was not; and as authority for this *Hennings* v. *Pauchard*,[4] was cited. Abbott C. J., referring to the case in Croke, said; "that has been already overruled after two arguments in the case of *Freeman* v. *West* upon reasons, which appear to me to be quite satisfactory. The Court there held that a power to deliver seisin, according to the true meaning of the lease, did not confine the attorney to make livery of seisin on the particular day of the date of the deed, but extended to his doing so at some convenient opportunity afterwards. I think therefore that the livery of seisin was properly made in this case." So under an authority to sell certain property, part may be sold at one time, and part at another.[5] So also a power to make livery, the attorney may make livery for part at one time, and for other part at another.[6]

The agent's exercise of his authority under power of attorney.—The agent may, when acting under a power of attorney, whether created by an instrument executed either before or after the 1st day of May, 1882, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of

[1] *Guthrie* v. *Armstrong*, 5 B. & Ald., 628. *Co. Litt.*, 238 (*a*).

[2] 3 B. & Ald, 156.

[3] 2 Wils, 167.

[4] Cro. Jac., 153.

[5] Com. Dig. "Attorney," C., 15.

[6] *Batley* v. *Trevillion*, Sir F. Moore, 280, per Anderson C. J.

the donor of the power.[1] But where a formal instrument is to be executed by the agent under a power the principal and not the agent should be named as a party thereto,[2] and generally it may be said, that where an interest is intended to to pass from the principal by an instrument, it should in terms be conveyed by the principal,[3] and be executed as provided above. And the reason of it is that the power of attorney vests no interest in the agent, and consequently none can pass from him. Where, however, the authority of the agent is coupled with an interest in the subject matter of the agency, it appears that this rule does not apply, for there the deed of the agent may convey the interest vested in him in connection with the power.[4] But it appears that ministerial or transitory acts *in pais*, such as surrender of a copyhold or to make livery of seisin may be done even by an agent in his own name.[5] If authorized under a written power to bring suits, he should do so in the name of the person in whom the legal right of suit is vested, and this is so also where the power, is not in writing.[6] But an agent holding a power of attorney even if authorized by such power to appear and defend suits on behalf of his principal, is at liberty to refuse to accept service of summons and appear, but may either act upon the power or not as he may think proper.[7]

Verbal authority to sign.—As to verbal authorities to sign documents, there may be cases in which a statute may require the personal signature of the signer, but it has been held that the Common law rule *qui facit per alium facit per se* should not be restricted, unless a statute makes personal signature indispensable.[8] A verbal authorization to sign a memorandum of association has been held sufficient to bind the authorizor.[9] In the case last cited Cotton L. J., put the supposititous case of seven persons sitting round a table with a view to signing a document, and one of them saying to the other, "Sign for me," and he considered that to be a sufficient authority.

[1] Act VII of 1882, s. 2.

[2] Dart's V. & P., (5th ed.), 517, (6th ed.), 589.

[3] *Frontin* v. *Small*, 2 Lord Rayon, 1419. Bac. Abr "Leases," 1, 10, per Lord Chanc. Baron Gilbert

[4] See Story, 150.

[5] Bac. Abr. "Leases for years," 1, 10. Com Dig. "Attorney," G., 14.

[6] *Lala Manohur Doss* v. *Kishen Dyal*, 3 N. W. P. H. C., 175. *Choonee Sookul* v. *Hur Pershad*, 1 N. W. P. H. C., (ed. 1873), 277. *Juggenath* v. *Beck*, 2 N. W. P H. C., 60. *Hursarun Singh* v. *Parshun Singh*, 2 N. W. P. H. C., 415 *Nubeen Chunder Paul* v. *Stephenson*, 15 W. R., 534. *Carter* v. *Misree Lal*, 2 N. W., 179. *Koonjo Behari Roy* v. *Poorno Chunder Chatterjee*, I. L. R., 9 Calc., 450. *Ladlee Pershad* v. *Gunga Pershad* 4 N. W P. H. C., 50. *Fyazooddeen* v. *Pudmee*, 4 N. W. P. H. C., 68.

[7] *In re Luchman Chund*, I. L. R., 8 Calc, 317.

[8] *Reg* v. *Justices of Kent*, L. R., 8 Q. B., 305.

[9] *In re Whitley Partners*, L R., 32 Ch. D., 337.

The exercise of the authority as to negotiable instruments—I. Promissory notes—II Bills of exchange.— I. A duly authorized agent signing his name to a promissory note, bill of exchange or cheque, must, if he intends to avoid personal responsibility, indicate thereon that he signs as agent, or that he does not thereby intend to incur personal responsibility. If he does not do so he will be personally liable on the instrument, save to those who induced him to sign upon the belief that the principal would only be held liable.[1] As to whether the rule laid down in s. 233 of the Contract Act, that where an agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable, applies to such a case appears to be doubtful having regard to the Law Merchant—This matter will, however, be again referred to when dealing with the question of the liability of principals to third persons.

Effect of the use of the pronoun "I".—It appears that if the agent signs sufficiently to denote that he is an agent acting on behalf of his principal, the use of the pronoun "I" in the body of the note, is not enough to fix him with the personal responsibility. Thus where one Richard Mitchell one of the members of a firm of bankers signed a promissory note "I promise to pay the bearer on demand 5£ value received,

For John Clarke, Richard Mitchell, J. Phillips, T. Smith,
Richard Mitchell."

The Court held that such note was *primâ facie* a promise by one partner, for himself and the other three partners, and it amounted to one promise of the four persons constituting the firm, and that as Mitchell had authority as a partner the firm was bound.[2]

The mere addition to the signature of words descriptive of the office of the signer will not be sufficient to free from liability.—The cases of *Bottomley* v. *Fisher*,[3] *Price* v. *Taylor*,[4] appear to show that persons who promise in their own names to pay money cannot free themselves from personal liability by merely adding to their signatures words descriptive of their office, such as "Secretary or trustee"; and this is also so when the word "executor" is added to a signature[5] unless the signer expressly limits his liability to the extent of the assets received by him as such.[6] And Lord Chief Justice Cockburn in

[1] Act XXVI of 1881, s. 28

[2] *Ex-parte Buckley, in re Clarke*, 14 M & W., 469. See also as to this *Alexander* v *Steer* L. R, 4 Ex., 104, which, however, is a case on a note on behalf of a Company

[3] 1 H. & C., 211, (217).

[4] 5 H & N, 540.

[5] *Childs* v. *Monins*, 2 B. and B. 460. 5 Moo, 282.

[6] Act XXVI of 1881, s 29.

Dutton v. *Marsh*,[1] has laid down, (and the decision has been followed in this country,) that the effect of the authorities is clearly, "that where parties in making a promisory note ..... describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors but do not state that they are acting on behalf of the Company—they are individually liable."

In *Price* v. *Taylor*,[2] one of the cases above referred to, three persons members of the No. 3, Midland Counties Building Society, signed the following promissory note :

"Midland Counties Building Society, No. 3
Birmingham.

Two months after demand in writing we promise to pay to Mr. Thomas Price the sum of one hundred pounds with interest after the rate of six pounds per cent. per annum for value received.

W. R. Heath,
John Taylor, Trustees,
W. D. Fisher, Secretary,"

the Court held that the note showed no intention on the part of the defendants to exempt themselves from personal responsibility. That the words "Midland Counties Building Society, No. 3" might well be the name of the place from which the note was dated; and that the promise was not qualified.

So where principal is named only in body of note.—It is not enough to excuse from liability the agent if he gives merely the name of the principal in the body of the note, and signs it personally himself, the presumption as a general rule being that the executant is liable unless there is clear indication to the contrary.[3]

Where principal's name is disclosed in body, and agent signs in representative character, agent is not liable.—Where the body of the instrument shows that it was executed for a named principal and the person executing it adds words descriptive of his representative character the principal will be bound.[4]

Signature of Promissory notes by Companies.—Promissory notes, bills of exchange or hundis are binding on a limited Company incorporated under the Indian Companies Act of 1882, if made drawn, accepted or endorsed in the name of the Company, by any person acting under the authority of the Com-

[1] L. R 6 Q. B., 361, (364). See also *New Flemming S. & W. Co. in re* I. L. R., 3 Bom., 439; I. L. R., 4 Bom., 275.

[2] 5 H. & N., 540.

[3] *Leadbitter* v. *Farrow*, 5 M. & S. 345

[4] *Landus* v. *Melrose*, 2 H & N., 293.

pany, or if made, accepted or endorsed by or on behalf, or on account of the Company by any person acting under its authority.[1]

Agent using words importing agency in signature, and not in the body of the instrument, not personally liable.—In *Alexander* v. *Sizer*,[2] the Secretary of an incorporated Company in pursuance of a resolution passed at a general meeting made and signed a promissory note "On demand I promise to pay Messrs Alexander & Co, or order £1500 ..... value received. For Mistley Thorpe and Walter Railway Company John Sizer, Secretary" Kelly C. B., and Pigott B., (Cleasby B, hesitating,) considered that the contract on the face of it, did not purport to be a personal contract by the Secretary Kelly C B, said:—"We find that although in the body of it the personal pronoun "I" is used, it is signed "John Sizer, *Secretary* for the Company Unless intended to be the Conpany's note, and not his own, it is difficult to see why it was signed as "Secretary" at all, or why the Company's name was introduced into it. I have no doubt it was signed by the defendant only as Secretary, and was intended as the note of the Company. ..... I am unable to distinguish this case from *Lindus* v. *Melrose*.[3] There three of the directors of an incorporated Company signed a note by which they "jointly promised" to pay £600, and to their signatures they added their description, "director," and the instrument being a note, and not a bill of exchange, they were held not to be liable. *Aggs* v. *Nicholson*,[4] is much to the same effect It is, however rather a stronger case than the present, for in the body of the note in that case the makers were described as agents" Cleasly B, said: "Looking at the whole instrument together, and giving full effect to the case of the pronoun "I" in the body of it, I think, it may be fairly contended that the signature was to be by one person only, and that the person who did sign it assumed thereby a personal liability. But I do not entertain so strong an opinion on the subject as to cause me to differ from the view expressed by the Lord Chief Baron, and my brother Pigott, and I therefore concur with them though with some hesitation." The case of *Dutton* v. *Marsh*[5] is a further example of the individual liability of persons executing negotiable instruments in their own names adding words descriptive of their office, but not stating on the face of the document that it is on account of the person for whom they are acting, and further shows that the addition of the employers' seal in such case

[1] Act VI of 1882, s 72, read with s 28 of Act XXVI of 1881

[2] L R., 4 Ex, 104.

[3] 2 H & N, 293.

[4] 1 H & N, 165

[5] L R, 6 Q B, 361 See also *McCollin* v *Gilpin*, L R, 5 Q B D, 390, L. R, 6 Q. B, D, 516

is insufficient; there four directors of a joint Stock Company signed their names to a promissory note "We the directors of the Isle of Man Slate Company Ld., do promise to pay J. D. ..... for value received (Signed) R. J. N., Chairman, F. H., S. B., H. J.;" and at one corner of the note the Company's seal was affixed, with "witnessed by L L.," it was there held that the directors were personally liable as makers of the note; for that there was nothing in the note itself to exclude this personal liability, and that the fact that the Company's seal was affixed was not sufficient to shew that the note was signed on behalf of the Company. Cockburn C. J., said:—"The effect of the authorities is clearly this, that where parties in making a promissory note, or accepting a bill of exchange describe themselves as directors, or by any other similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing, if they merely describe themselves as directors, but do not state that they are acting on behalf of the Company—they are individually liable. But on the other hand if they state they are signing the note or acceptance on account of or on behalf of some Company or body of whom they are the directors, and the representatives, in that case as the case of *Lindus* v. *Melrose*[1] fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the Company, as the statement on the face of the document represented. If therefore, in this case it had simply stood that the defendants described as directors, but without saying "on behalf of the Company," signed the promissory note, it is clear that they would have been personally liable, and could not be considered as binding the Company. But this was rendered doubtful by the fact of the Corporate seal being affixed to the document. It does not purport in form to be a promissory note made on behalf of or on account of the Company. So far as the written portion of it goes, it is totally without any such qualifying expression, but some doubt was raised in my mind whether the affixing the seal might not be taken as equivalent to a declaration in terms on the face of the note, that the note was signed by the persons who put their names to it on behalf of the Company, and not on behalf of themselves. But on consideration I agree with my learned Brothers that that effect cannot be given to the placing of the seal of the Company upon the note; it may be that that was simply for the purpose of ear marking the transaction, or in fact showing, as to the directors, that as between them and the Company, it was for the Company they were signing the note, and that it was a transaction in which the proceeds to be received upon the note would operate to the benefit of the Company; but there is no case which goes the length of saying, that the affixing the seal, where the parties do not otherwise use terms to exclude their personal liability, would have that effect. We think it going too far to say that the

[1] 3 H. & N., 177.

affixing the seal had that effect." This case has been followed in, *In re The New Flemming Spinning and Weaving Company*,[1] a case of a bill of exchange in which Green J., gave reasons for concluding that *Dutton* v. *Marsh* was a case falling under s. 47 of the Companies Act of 1862, and stated that English decisions on the construction of that section were directly applicable to the corresponding section of the Indian Companies Act, saying:—"I am of opinion that the cases show that whether or no a *note* or bill must, on the fact of it, *express* that it is made, accepted or endorsed, "by or on behalf or on account of" the Company, yet there must be on the face of it that which shows that it was so made, accepted, or endorsed, and which excludes the inference that it was made, accepted, or endorsed, by or on behalf, or on account of any other person. A bill, or note, of course, may be in a certain sense on behalf of, or on account of, a Company, though there is upon its face no reference to the Company even in the form of a description of the persons who actually make, accept, or endorse, as being directors or Secretary. As between such persons and the Company, such a bill or note may well be on behalf, or on account, of the Company; but it is not therefore so as between the Company and third parties. So far as third parties are concerned, a Company under the Act can be made liable on a bill or note only when such bill or note on the face of it expresses that it was made, accepted, or endorsed by, or on behalf, or on account of the Company, or where that fact appears by necessary inference from what the face of the instrument itself shows. The addition to the signatures of individuals as makers, drawers, acceptors or endorsers of notes or bills, of their description as director or directors, secretary, treasurer, and agent of a certain Company, is not considered to raise such inference, as it does not exclude the supposition that though described as directors, they intended to make themselves personally liable to holders of the instrument, though as between themselves and the Company they may be entitled to be indemnified for anything they may have paid on account of the Company in respect of such notes or bills. But if they intended or may have intended to make themselves personally liable, then they did not intend or may not have intended to make the Company liable to the holders, and in either case it would be impossible to say with certainty, or as a matter of necessary inference, that the note or bill was made, accepted or endorsed on behalf, or on account of the Company." On appeal this decision was affirmed by Sir C. Sargent and Mr. Justice Bayley.[2]

II. Bills of Exchange.—The exercise of the authority in drawing, accepting or endorsing bills of exchange is regulated by section 28 of the Negotiable Instruments Act, and in the case of an incorporated Company by that section and s. 72 of the Indian Companies Act of 1882, this latter section enacts, "that

[1] I. L. R., 3 Bom., 439.

[2] *In re The New Flemming Spinning and Weaving Co.*, I. L. R., 4 Bom., 275.

a promissory note or bill of exchange shall be deemed to have been made, accepted or endorsed on behalf of any Company by any person acting under the authority of the Company; or if made, accepted or endorsed by or on behalf of the Company, by any person acting under the authority of the Company."

Bills accepted on behalf of Companies.—Under section 47 of the English Act of 1862 corresponding with s. 72 of the Indian Companies Act, it has, notwithstanding the above rule, which is also the law in England, been held in a case in which the Company was the drawee, and its directors and secretary the acceptors, that no terms need appear on the face of the acceptance implying that the bill was accepted on behalf or by authority of the Company, if the bill was in fact accepted by a person acting under the authority or on behalf of the Company. The case referred to is that of *Okell* v. *Charles*,[1] there the form of the bill was as follows; "Twenty-four months after date pay to my order the sum of £275, 3*s*., for value received,

Thomas Young.

To the Great Snowdon Mountain Copper Mining
Company Limited—Lombard St.

and this was crossed—"accepted payable at
Messrs. Barclay Beavan and Company."
J. Macdonald.
Rob. Charles.
Directors of the Great Snowdon Mountain
Copper Mining Company.
D. B Crosbie, Secretary.

Endorsed—Thomas Young.—Okell and Co."

The defendants Charles and Macdonald were sued as having individually accepted the bill. The Court of Common Pleas Division decided that the directors not being the drawees could not accept so as to make themselves personally liable; and from this decision the plaintiffs appealed. The Master of the Rolls said:—"The whole question depends upon the 47th section of the Companies Act, 1862 which enacts that 'a promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any Company under this Act, if made, accepted or endorsed in the name of the Company, or if made, accepted or endorsed by or on behalf or on account of the Company, by any person acting under the authority of the Company.' It has been admitted in this case that the two directors were persons acting under the authority of the Company and that they had authority to accept this bill of exchange. The section has, in fact, been fully complied with, but it has been argued that compliance must appear upon the face of the bill—that it must be expressed that it is made on behalf of the Company. But even if such terms as that had been used in the

[1] 34 L. T., 822.

Act (and they have not) it is still a question whether these bills would be binding upon the defendants personally; but it is not necessary for us to decide that, as the words "expressed to be made on behalf of the Company" are not in the Act of Parliament ..... In the 45th section of the prior Act it is required not only that bills shall be accepted on behalf of the Company, but also that 'it shall be by such directors expressed to be made or accepted by them on behalf of the said Company.' But those words are left out in the later Act; in other words they are repealed, because it is no longer intended that it should be expressed on the bill that it is made on behalf of the Company. The legislature have decided that the words are not wanted. The meaning of the words is necessary, but not the words themselves. Does it appear then that these acceptances were made on behalf of the Company? They are directed to the Company, so the Company must accept them. You conclude at once that they are accepted by the drawee. You find that they are accepted by the directors and Secretary of the Company: you conclude that they so accept them on behalf of the Company. If the acceptances had stood alone they might possibly not have been enough to bind the Company, but coupled with the fact that the Company is the drawee, it is perfectly clear that they come within the Act, and that the directors are not personaly liable. Kelly C. B., said:—"No terms need appear on the face of the acceptance implying that it is on behalf of or by authority of the Company. The bill shall bind the Company if made by its authority, or on its behalf. ..... The case differs from cases on promissory notes, for a promissory note is a totally different thing from an acceptance of a bill of exchange, which incorporates in the acceptance the person on whom it is drawn." It has been doubted, however, whether the principle laid down in this case would be applicable to the case of a drawer of a bill.[1] The case of *Okell* v. *Charles*, has been discussed and distinguished in the case of the *New Flemming Spinning and Weaving Company*.[2] There, the bill of exchange was in the following form. "Sixty days after date of this first of exchange (second and third of the same tenor and date not being paid) pay to the order of Dr. Sidney Smith the sum of rupees two lacs only. Value received and place to the account of

G. Padumsey,
K. Naik,
N. Kessowji,
Secretary, Treasurer, and Agent
The New Flemming S. & W. Co., Ld.

To Messrs. Shamji Nursey and Company,
Calcutta.

[1] See Evans on Pr. & Ag., 214.

[2] I. L. R., 3 Bom., 439.

The bill was endorsed, No 990, Rs 200,000
Due 22nd January, 1879.
Pay Bank of Bombay or order
Sidney Smith.

The question raised was, whether the bill was in such form as to render the Company liable. The authority of the Company to raise money by drawing, endorsing or accepting bills was found in the affirmative. The bill was stated by affidavit to have been accepted by Shamji Nursey and Company. As regards the form of the bill the first two signatures were in Guzerati, with the names in English character following; the third was in the English character; the words and letters "Secretary, treasurer and agent" and "The S. and W. Company, Ld" in printed letters, as were other formal parts of the instrument. Green J., said; "All that can be said of the fact of there being a printed form is that it was caused to be prepared by some person as a form of bill to be drawn by some one—whether alone or with others—who was secretary, treasurer, and agent of some Spinning and Weaving Company, as the words "New Flemming" are in writing not in print. Assuming that Companies under the Act are by s. 47 liable on bills of exchange *drawn* on their behalf, or on account of persons acting under their authority, was this bill such? The conclusion at which I arrived is, that it was not." His Lordship then laid down the law as set out in words in a previous portion of the lecture, holding that there must be on the face of the bill something to show that it was drawn, accepted or endorsed by or on behalf or on account of the Company, excluding the inference that it was drawn, accepted or endorsed by or on behalf, or an account of any other person. And after stating that he failed to be able to distinguish the case from *Dutton* v *Marsh*,[1] and considering that that case was one falling under s. 47 of the English Company's Act of 1862, continued:—"Nothing of the nature of an authority was referred to, to meet *Dutton* v. *Marsh*, except a note to s 47 in Buckley's Treatise on the Companies Act, 3rd ed, p 138, citing a case of *Okell* v. *Charles*.[2] The report itself is not available here, and the only means we have of knowing what was really decided, is from the note in Buckley, and the entry of the case in Fisher's Digest. The statement of the case by Buckley, however, shows that it was a case of a bill of exchange addressed to the Company by name, and signed, (I suppose it is meant, signed in the way of acceptance) A. B C. and D. directors of the Company. It is said to have been there held that such a bill bound the Company and not the directors as individuals. But that is a very different case from the present *There* the bill was drawn on the Company itself, *here* on persons, who so far as appears, are wholly strangers to the Company. I think the line of reasoning on which the decision in *Okell* v. *Charles* was based, was in all probability the same as is to be found in *Mare* v.

[1] L. R., 6 Q. B., 361. [2] 34 L. T., 822.

Charles,[1] though that was what is commonly called a converse case to *Okell* v. *Charles* ..... Now I have little doubt in my own mind, that if we had the report itself, *Okell* v. *Charles* would be found to have been decided on the same grounds. The bill was drawn on the Company. Unless the acceptance was by or on behalf or on account of the Company, it would have been a nullity, and this consideration was sufficient to raise the inference (and this too, wholly apart from what appeared on the face of the instrument itself) that the persons who wrote the acceptance, "A. B C. and D. directors of the Company," did so on behalf and account of the Company, on whom, and not on them as individuals, the bill was drawn, and that though they used such form of acceptance as standing by itself, and apart from the fact that the bill was drawn on the Company, would have charged them as individuals, and would not have charged the Company" ..... and after distinguishing the case before the Court from *Lindus* v. *Melrose*,[2] his Lordship, was of opinion that the addition after the signatures G. P. K. N. N K., of their description respectively as directors and secretary, treasurer and agent, did not make the bill, a bill drawn by or on behalf or on account of the Company, and that therefore the Company was not liable. On appeal, *In re the New Flemming S. and W. Company, Ld*[3] it was contended that under s. 47, it was not necessary to bind the Company, that the bill should expressly state that it was clearly by or on behalf of the Company (*Okell* v. *Charles*); and that under that section evidence might be received to show the circumstances under which the bill was drawn Sargent C J., said :—"In *Cortauld* v. *Saunders*,[3] which was a case under the English Act of 1862, corresponding with the Indian Act of 1866, the question now raised was touched upon in argument, and Chief Justice Bovill in delivering judgment said :—'It can scarcely be said that a note would be binding on a Company if it bore the signatures of the directors, but did not on its face purport to be the note of the Company or made on their behalf.' Again in *Okell* v. *Charles* where the directors were also sued, and which was much relied on by both sides, it was decided that the bill or note need not, in the English Act of 1862, be expressed to be made by the directors on behalf of the Company, to make the Company liable, as had been required by 7 & 8 Vic., c. 110. The Master of the Rolls, Sir George Jessell says :—'The legislature have decided that the words are not wanted. The meaning of the words is necessary, but not the words themselves.' And he then proceeds to show that the meaning could be inferred from the combined circumstances of the bill having been addressed to the Company, and accepted by its directors. But he concludes his judgment by saying :—'If the acceptances, (*i. e.*, by the directors) had stood alone, (by which we understand the learned Judge as mean-

[1] 5 El. & Bl., 978.

[2] 2 H. & N., 293, a case on a note.

[3] I. L. R., 4 Bom., 275.

[4] 15 W. R., (Eng.) 506; 16 L. T. 562.

ing that if it had been addressed to the directors and accepted by them) they might possibly not have been enough to bind the Company, but, coupled with the fact that the Company is the drawee, it is perfectly clear that they come within the Act' The Master of the Rolls treated the question, whether the bill was accepted on behalf of the Company, as one to be decided on the face of the instrument. Kelly C B, however, in his judgment says:--'No terms need appear on the face of the acceptance, implying that it is on behalf or by authority of the Company The bill shall bind the Company if made by it's authority or on it's behalf It is admitted here that, *de facto* the bills were accepted on behalf of the Company and by persons with authority so to bind them.' These remarks of the Chief Baron would certainly show that he considered the admission by the plaintiff, that the bill was accepted on behalf of the Company, as sufficient to meet the requirements of the Act; *but they cannot be taken even as an expression of opinion that, if the fact had been in dispute between the parties, the defendants could be allowed to prove it in order to discharge themselves.* Although therefore this case goes nearer than any other to raise the question before us, it cannot be regarded as having decided it." ..... With regard to the rule laid down in *Miles' claim*[1] and in *Beckham* v. *Drake*,[2] to the effect—that, nobody is liable on bills of exchange and promissory notes, unless his name, or the name of some partnership or body of persons of which he is one, appears either on the face or the back of the instrument. His Lordship said:—"It is plain however, that in applying this rule, the name on the bill or note need not be the ordinary name of the individual or the partnership but one which the individual or partnership is authorized to be used as his or their name on the bill or note with the intention of pledging their credit" ..... If, therefore, a Company had power to authorize its directors to draw, accept, or endorse bills in their own names on behalf of the Company, evidence might doubtless be given, consistent with the circumstances, to prove that such authority had been given; but we think it requires a far clearer expression of intention, than the language of this section affords, to justify the conclusion that the legislature contemplated a Company, incorporated under the Act, being bound by the use on a bill or note, of any other than the registered name by which it is known to the public." ..... His Lordship moreover considered that the phraseology of s. 47 of the Act of 1862 to the operation of which from the very nature of its provisions, was confined to the form of the bill or note on which the Company is to be held liable, and for the above reason considered that the learned Judge was right in holding that in order to make the Company liable, it must appear on the face of the bill or note, that it was intended to be drawn, accepted or made, on behalf of the Company. This case has been followed *in re*

[1] L R., 9 Ch App, 635

[2] 9 M. & W., 79.

the Nursey Spinning and Weaving Company, Ld.[1] But although directors cannot bind a Company by bill save as above laid down, yet a Company, which by it's directors, acting within their authority, has sold a bill as a bill on which it is liable, but which afterwards turns out to be one upon which it is not liable, may be held liable upon the ground that it has held out its directors as having an authority to bind the Company by their bill in the form in question, and they not having such authority, the Company would be guilty of misrepresentation within ss. 18 and 19 of the Contract Act, and would be liable for the amount of the bill.[1] *In re the Nursey Spinning and Weaving Co.*, the National Bank of India purchased from the above named Company a bill of exchange for 4,000 dollars (Rs. 8,680) drawn by the Company upon the firm of Nursey Kessowji and Company of Hongkong. "Sixty days after sight ..... pay to the order of National Bank of India the sum of 4000 dollars. Value received and, place the same to the account of

Accepted Hongkong N. K. & Co.

(Sd.) N. K. } Directors.
G. P. }

N. K., Secretary, Treasurer, and agent.
The Nursey S. and W. Co., Ld."

The bill was presented but was dishonoured, and the Bank gave notice to the Company and demanded payment of the bill from the Company as drawers. The Company was ordered to be wound up, and the Bank sent in their claim against the Company as drawers of the bill, *held* on the authority of the *New Flemming S. and W. Company, Ld.*,[2] that having regard to the form of the bill, the Nursey Company could not be made liable as drawers.

The instrument to bind the Company must be for the purposes of the business of the Company.—Thus in the *Oriental Bank Corporation* v. *Baree Tea Co., Ld.*,[3] Messrs. Nicholl and Company drew a bill for Rs. 15000 payable to "us or order" directed to the Managing Agents, Baree Tea Company, Limited. Across the bill was written "accepted, due 22nd—25th July 1880. Nicholl and Company, Managing Agents, Baree Tea Company, Ld." This bill was endorsed by Nicholl and Company to the Oriental Bank and was discounted by the Bank at the market rate, the proceeds being credited in the general Banking account of Nicholl and Company. Nicholl and Company subsequently drew out the amounts by cheques drawn by them personally without reference to the Baree Tea Company. The Baree Tea Company denied the authority of Nicholl and Company to accept the bill so as to bind the Company, and denied that the bills were drawn or accepted for the purposes of the Tea Company. It was contended by the Bank that it need not be expressed in words that the bills were made "by or on behalf of the Company,"

[1] I. L. R., 5 Bom., 92. [2] I. L. R., 4 Bom, 275. [3] I. L R., 9 Calc., 880.

if there was sufficient to show that they were so made, and that there was exclusion of personal liability, *held* that it was unnecessary to decide whether the bills were accepted in such form as to bind the Baree Tea Company, as upon the plaintiff Bank's evidences the bill was not drawn or accepted for the purposes of the Company, and that it was not necessary for Nicholl and Company to accept the bill to enable them to carry on the business of the Company.

Bills on or by private individuals.—In the case of bills other than those drawn on or by, or accepted by, an incorporated Company, the rule laid down in s. 28 of the Negotiable Instruments Act will apply, and where an agent when acting on behalf of his principal, in the purchase of foreign bills endorses them to him without qualification he will be himself personally liable on his endorsement.[1] So where a bill is drawn by a firm on a private person, it has been held in *Mare* v. *Charles*,[2] where the bill has been accepted by such person, that he will be personally liable thereon, although he adds to his signature, when accepting, the designation of his office. In that case the bill ran:—"Three months after date pay to our order ..... the sum of—£ value received in machinery supplied the adventures in Hayter and Holme Moor Mines.

J. F. Mare & Co.

To Mr. W. Charles.

Accepted for the Company.

Wm. Charles, Purser." The Court held that the bill was drawn upon the defendant as an individual, and that where a drawer accepts a bill, unless there be upon the face of it a distinct disclaimer of personal liability, he must be taken to have accepted personally, and that the form of acceptance was one making the defendant personally liable. Similarly, where an agent drew a bill on a firm for whom he was agent, without stating that he drew as agent, the Court held that he was responsible, and further doubted whether the agency had been made out.[3] As to this case, it has however been said in a later case,[4] that the decision was not put upon the ground that he must show on the face of the bill that he acted as agent.

Effect of custom as to instruments in an oriental language.—The Negotiable Instruments Act of 1881, does not affect any local usage relating to any instrument in an oriental language, but persons by indicating an intention in any negotiable instrument that the legal relations of the parties thereto shall be governed by the Act, may exclude such usages.[5]

Custom of Dacca as to drawing Hundis.—In *Huree Mohun Bysack* v.

[1] *Goupy* v. *Harden*, 7 Taunt., 159.

[2] 25 L. J. Q. B., 119. See also *Nichols* v. *Diamond*, 23 L. J., Ex., 1.

[3] *Pigou* v. *Ramkishen*, 2 W. R., 301

[4] *Huree Mohun Bysack*, v. *Krishno Mohun Bysack*, 17 W. R., 442.

[5] Act XXVI of 1881, s. 1.

Krishno Mohun Bysack,[1] a case decided previously to the passing of the Negotiable Instruments Act of 1881 Huree Mohun and Ram Churn Pal, gomastas of Sham Soonder, drew a hundi for Rs. 1,000 in their own names in favour of Krishno Mohun, which was accepted by Sham Soonder Bysack. On due date the plaintiff Krishno Mohun applied for payment, but the acceptor being unable to pay up the full amount, paid Rs. 400 on account of the hundi, and shortly afterwards became insolvent. The drawee then brought a suit against the drawers for the balance. The defence set up was, that they were the gomastas of Sham Soonder the acceptor, and drew the hundi on his behalf. The Court of first instance found that there was a custom at Dacca, that gomastas drawing hundis on their principals were not bound to state on the face of the hundi that they drew as gomastas, and that it was sufficient if it was proved that they stood in that relation to the party on whom the hundi was drawn. Glover J., said :—It has been more than once held that the Mofussil Courts are not bound by the strict technicalities of the English law; in this case there is evidence of the most decisive character not only that these defendants are ordinary gomastas of Sham Soonder ... .. but also that they had no interest whatever in the bill when drawn, and that it was the custom of gomastas in similar situations to draw bills on their principals without being thereby rendered liable for the defections of their principal . .... In the other case quoted *Pigou* v. *Ram Kishen*,[2] the point decided had reference to notice of dishonour. No doubt there is in the body of the decision some remarks to the effect that an agent, unless he shows on the face of the bill of exchange that he drew as agent, cannot set up the defence of agency to exonerate himself from liability, but that was not the point on which the decision proceeded, and appears to have been an *obiter dictum*. It was moreover a point which has reference solely to the technical procedure of English law, which does not apply where there is proof of a local custom."

Ambiguity as to whom bill is addressed.—An ambiguity in the address of a bill is not enough of itself to displace the liability of an agent accepting it. This was laid down in *Herald* v. *Connah*,[3] where the bill was as follows, "Three months after date pay to my order £137, 10*s*., value received in account (Fire policy, No. 597)

Thomas Herald.

To Henry Connah, Esq.
General Agent of L'Unione
Compagna D'Assicurazione Generale
Accepted payable at 8 York St. Manch.
on behalf of the Company.
H. Connah."

[1] 17 W. R., 442. [2] 2 W. R., 301. [3] 34 L. T. N. S., 885.

In an action against Connah personally on this bill Bramwell B., said :—"To whom was the bill addressed? To Connah. If it had been intended that the bill should have been so addressed to the Company, it should have been so addressed in plain words ..... It is true the bill describes Connah as a general agent, but still it is directed to him in his own name, and the rest is mere matter of description, showing the reason why it is addressed to him ..... Now I hold that the right way for a person who is accepting for another, to notify that he is so accepting, is for him to use such words as "accepted for" or "*per proc*," but the defendant here makes use of no such expressions. The words used in this bill are not the ordinary words used to show that the acceptor is accepting as agent. And I should say that, even if there were an ambiguity in the address of this bill, that that would not be enough of itself to displace the liability of Connah on his acceptance—but when we see that bill is particularly addressed to him, and when we consider the right way of accepting as agent, is to say that he signs "*per proc*," not "on behalf of," it becomes clearer still that he is personally liable upon it." Cleasby B., was of the same opinion. Huddleston B., said :—"I think this bill was directed to Connah personally, the words "general agent," being words of description merely, and that therefore upon the authority of *Mare* v. *Charles*[1] he is personally liable as acceptor.

Where the bill is drawn for the debt of a third person and is signed without qualification, the signer is liable.—In *Sowerby* v. *Butcher*,[2] the plaintiff supplied goods consigned to Devey and Company for which Robert Butcher was liable, and for which he drew a bill on Devey and Company making himself responsible unless they should pay; the bill was returned in consequence of the shortness of its date, and having a right to another bill from Robert Butcher, the plaintiff went to his office to obtain a fresh bill, but on finding that he had left, and that his affairs were under investigation, asked his brother the defendant to sign the bill, the defendant made no objection and signed the bill in his own name without reservation of any kind. Bayley J., said: "He (the defendant) might have given a bill stating on the face of it that he drew it for Robert Butcher; and if he had stated that he drew it as agent, and had asked for a written acknowledgment that he should only be held liable as agent, he would have acted the part of a prudent man, and having got rid of the personal obligation to which, by signing generally, a party is liable." Vaughan B., said :—"What are the circumstances under which the bill is signed? The defendant is found in Robert Butcher's counting-house, acting at least as if he was conducting his business, although it is said he was there only to investigate his affairs, and upon the statement made to him by the plaintiff's clerk, he signs the bill without any objection or difficulty. Now what ought he to

[1] 5 E. & B., 978. [2] 2 Cr. & M., 368.

have done, if he did not intend to make himself personally responsible? Why he ought to have objected to sign, except as agent"

The exercise of the authority in the case of other, simple contracts, Charterparties; Bought and Sold notes, &c—The agent may so exercise his authority as to free himself from all responsibility when contracting; but on the other hand he may also make himself personally liable. The question whether a person actually signing a contract is to be deemed to be contracting personally, or as agent only, depends upon the intention of the parties as discoverable from the contract itself.[1] Where it is plain on the face of the contract, that he is contracting on behalf of his principal he cannot be held personally liable on the contract,[2] and as a consequence he cannot sue or be sued thereon. Where, however, he signs the contract in his own name, without restriction he is *primâ facie* to be deemed to be contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal.[3] But the fact that the signature is expressed to be made "as agent" is strong to show that the person signing does not mean to bind himself personally, if the terms of the contract itself do not show a contrary intention,[4] nevertheless mere words of description attaching to a signature will not alone be sufficient to free the agent from liability Where, however, the agent signs the contract being induced to do so on the belief that the principal will alone be held responsible, he will not be liable.[5]

Charterparties executed by agent so as not to make himself personally liable thereon—In *Deslandes* v. *Gregory*,[6] the defendants in the body of the charterparty were stated as contracting "as agents to Samuel Fergusson," and the charterparty was signed "For Samuel Fergusson, Gregory Brothers as agents" It was contended that the defendants were liable as principals. Wightman J., said:—"Their signature is plainly expressed to be "for Fergusson" and "as agents." If that is not enough to exclude them from personal liability, they having contracted in the body of the charterparty also, "as agents," I am at a loss to see what other mode of signature would be sufficient." Crompton J. and Hill J, agreed with this decision. In *Wagstaff* v. *Anderson*,[6] Bramwell J., said:—In some cases it has been held that the description "as agents" is not conclusive against personal liability, although the signature has been professedly "as agent," but I think that those cases cannot be applicable to one of this kind.

[1] *Note to Thomson* v. *Davenport*, 2 Sm. L C., (9th ed.), 420. *Soopromonian Setty* v. *Heilgers*, I. L. R., 5 Calc., 71.

[2] Ind. Contr. Act, s. 230, para. 1.

[3] *Note to Thomson* v *Davenport*, 2 Sm L. C., 9th ed., 420.

[4] *Deslandes* v. *Gregory*, 2 E. & E., 602.

[5] Ind. Contr. Act, s. 234, *Wake* v. *Harrop*, 6 H. & N., 768, affirmed, 1 H. & C., 202

[6] L. R., 5 C. P. D., 171, (175).

Moss and Mitchell are ship-brokers, and ship-brokers usually do not act for themselves; it then becomes manifest upon the face of this agreement that Moss and Mitchell are not professing to bind themselves, but are acting for the owners of the F. K. Dundas." In *Mackinnon Mackenzie and Company* v. *Lang Moir and Company*,[1] the plaintiffs by charterparty contracted to let the steam ship Oakdale to the defendant. The charterparty stated that the plaintiffs "agreed as agents for owners of the said steam ship," and provided that the owners should bind themselves to receive the cargo on board, and that the master on behalf of the owners should have a lien on the cargo for freight. The charterparty was signed by the plaintiffs in their own name, without restriction. It was admitted that the plaintiffs knew the names of the owners when the charterparty was signed. In a suit against the defendants for breach of the charterparty in refusing to load, West J., said:—"I think that although fifteen or twenty years ago the Common Law Courts in England would almost certainly have decided in favour of the plaintiff's responsibility, and their capacity to sue, yet the more recent decisions of *Southwell* v. *Bowditch*[2] and *Gadd* v. *Houghton*,[3] establish that in determining whether a personal responsibility has been incurred by the agent, and therefore, a personal capacity to sue, the whole of the contract made by him is to be examined. To the same effect is the case of *Soopromonian Setty* v. *Heilgers*,[4] recently decided at Calcutta. The result seems to be, that if the contract made by a person who is an agent is worded so as, when taken as a whole, to convey to the other contracting party the notion that the agent is contracting in that character, and that he is the mouth-piece through which the principal speaks, he cannot sue or be sued upon the contract. In the present case Messrs. Mackinnon, Mackenzie and Company say they made the agreement "as agents" for the owners of the steam ship Oakdale. No case has yet apparently decided that this would be enough to exclude their personal responsibility, and the corresponding right to sue. In this charterparty, however, there is more than this. It contains a clause by which the owners undertake to receive the cargo, "On being paid freight" ..... If the agents intended to contract a personal liability, this engagement would have been differently expressed. It would have been said "which they engage to receive on being paid, or on the owners being paid." As the contract stands, I think Mackinnon, Mackenzie and Company have clearly indicated that they are acting as agents, and that the contract is "entered into by them on behalf of their principals. They speak from the first as agents; the *owners* are to receive the cargo, the *owners* are to be paid the freight, and the effect of these facts is not done away with by their afterwards signing their own name simply."

[1] I. L. R., 5 Bom., 584.
[2] L. R., 1 C. P. D., 100, 374.
[3] L. R., 1 Ex. D., 357.
[4] I. L. R., 5 Calc., 71.

In *Hasonbhoy Visram* v. *Clapham*,[1] the charterparty stated that F. M. and Co. "as agents for master and owner" let the steam ship Hutton to E. for a certain term; and was signed by F. M. and Co. "as agents for master and owner." It appeared that F. M. and Co. were duly authorized to sign as agents for the owner, but had no authority from the master to sign the charter as his agents. In a suit by the assignee of the rights of E., under the charterparty against the defendants (the master, owner and agents) for an account of monies received by the defendants or their agents in respect of freight &c. Latham J., as to the position of F. M. and Co., said:—"I do not think that they are liable as principals on the charterparty under s. 230 of the Contract Act by reason of their signature as "agents for master and owners," as they appear on the face of the charterparty to sign merely as agents, and the case is governed by, and indeed having regard to the language of the instrument is even stronger than the cases of *Soopromonian Setty* v. *Heilgers*[2] and *Mackinnon, Mackenzie and Company* v. *Lang Moir and Company*.[3] These cases agree with the English decisions of *Fleet* v. *Murton*,[4] *Wagstaff* v. *Anderson*,[5] *Hutchinson* v. *Tatham*,[6] a charterparty case not unlike the present."

Cases on charterparties executed by the agent so as to make himself personally liable.—In *Hough* v. *Manzanos*,[7] decided in 1879, in the body of the charterparty the defendants were described as "agents for the charterers," but they signed it in their own names, without qualification, *held* that the defendants were liable, the words "as agents for charterers" in themselves not showing any intention that the agents did not intend to bind themselves as principals. In *Lennard* v. *Robinson*,[8] the charter stated that it was agreed between J. M. L. owner of the ship N., then at Genoa and "R. and F. of London, Merchants," and was signed "by authority of and as agents for Mr. A. H. of Mimel

pro. R. and F.
W. F. M.
J. M. L.

In an action by J. M. L. against R. and F. for damages for detention. The plaintiff declared that A. H. was a foreigner but defendant averred that the

[1] I. L. R., 7 Bom., 51, (65).
[2] I. L. R., 5 Calc., 71.
[3] I. L. R., 5 Bom., 584.
[4] L. R., 7 Q. B., 126.
[5] L. R., 5 C. P. D., 171.
[6] L. R., 8 C. P., 482.
[7] L. R., 4 Ex. D., 104.
[8] 5 El. & Bl., 125; but see *Gadd* v. *Houghton*, L. R., 1 Ex. D., 357, which appears to be irreconcileable with this case.

agreement was enterred into by the authority of, and for, and on behalf of, and as agents for A. H., and that he had been named to plaintiffs as the principal at the time the charter was made. Lord Campbell C. J., said:—"Looking at the whole of the contract I think the defendants are made personally liable, there is nothing in the signature to prevent them from being so. In the body of the contract they are contracting parties, and they may well become so "by authority of, and as agents for" their employer, that is, he may be liable to them. Coleridge J., attached some weight to the circumstance that the principal was a foreigner; for "it seems to me reasonable that a contracting party should require to have a party to whom he may look, and upon whom he may call for performance;" but considered that the defendants intended to be liable to the contract. Earle J., was of opinion that the defendants had made themselves primarily liable. In *Kennedy* v. *Gonveia*,[1] a consignee entered into an agreement for the charter of a vessel, "on behalf of Mr. M., merchant of L., the agreement stated "that the said parties agree," and was signed by the consignee personally without describing himself as agent: held that he was personally liable thereunder. In *Cooke* v. *Wilson*,[2] a contract for the conveyance of goods from Liverpool to Australia between J. and R. W. (owner) and S. J. C. on behalf of the Geelong and Melbourne Railway Company was signed J. and R. W.,

S. J. C.

held that S. J. C. was personally bound by the contract in a suit brought by S. J C. to recover under the contract. Crowder J., said:—"There is nothing upon the face of the contract distinctly showing that the plaintiff was contracting as agent for others. On the contrary there is everything to lead to the conclusion that he was contracting personally." In *Parker* v. *Winlow*,[3] the charter was between P. of the good ship C. and "W. agent for E. W. and Son" to whom the ship was addressed; and was signed by W. without restriction, held that W. was personally liable as charterer. Crompton J., said:—"Mere words of description attached to the name of a contractor, such as are used here, saying he is agent for another, cannot limit his liability as contracted. A man, though agent, may very well intend to bind himself; and he does bind himself if he contracts without restrictive words to show that he does not do so personally. It is important that mercantile men should understand that, if they mean to exclude personal recourse against themselves on contracts which they sign, they must use restrictive words, as if they sign per procuration; or use some other words to express that they are not to be personally liable." Lord Campbell C. J., said:—"Though it is not necessary, in the view which I take of this case, to decide the question whether the defendant bound himself personally by this contract, we ought not

[1] 3 D & R., 503. [2] 1 C. B. N. S., 153. [3] 7 El. & Bl., 942.

to allow any doubt to exist as to our opinion on the construction of such a contract. I can have no doubt myself, that the defendant is liable. He makes the contract himself, using apt words to show that he contracts; and the only ground suggested for rebutting his personal liability is that he says he is agent for another. But he may well contract and pledge his personal liability, though he is agent for another. If he had signed the contract as per procuration for E. W. and Son, he might have exempted himself from liability, but on principle and on the authorities cited, an agent is personally liable, if he is the contracting party; and he may be so though he names his principal."[1] In *Schiller* v. *Finlay*,[2] the charterparty was made by Messrs, Finlay Muir and Company "acting for the owners of the good Steamer Atholl" and was signed "Finlay, Muir and Company, agents of Steamer Atholl." In a suit for damages on the breach of a warranty in the charterparty, Phear J., held that Finlay Muir and Company were liable as principals. "It is a general principle that when one makes a contract, it must be taken to be his own contract unless he states at the time that it is not so and gives the name of the person for whom he makes it ..... It is true that F. M. and Company are described as "acting for the owners of the good Steamer Atholl," but this is an entirely different thing in my judgment from saying the owners of the good Steamer Atholl are the parties that are agreeing, not F. M. and Company: and F. M. and Company sign their own name at the end with an another description, *i. e.*, "Agents of the Steamer Atholl." It seems to me impossible to say that this charterparty, as it stands, is not in terms a contract between F. M. and Company on one side, and Borrodaile Schiller and Company on the other. It is not altogether an insignificant fact in this case that at the time of making of the contract, not only did not B. S. and Company know who the owners were, but F M. and Company were also ignorant on that point, and it was not probable, I think, that gentlemen forming a mercantile firm in Calcutta, such as B. S. and Company, would deliberately enter into a contract such as this with an unknown, unnamed, and absent principal, leaving the representatives of that principal in Calcutta altogether free from liability, and also leaving it to their discretion to say afterwards for whom it was they were contracting." In *Adams* v. *Hall*,[3] the charter was made between the defendants J. H. and Company "for owners of the good ship R." and A, the defendants signed "for owners J. H. and Company" at the trial of a suit against the defendants who were a firm of ship-brokers for damages done to the cargo, three letters which had passed between the plaintiff and the defendants and their solicitors were admitted in evidence which went to show that J H. and Company were principals, and as soon as the plaintiffs' case was closed, the defendants' solicitor objected that there was no evidence against the defendants as principals, and

[1] See *Williamson* v. *Barton*, 7 H. & N., 899.

[2] 34 L. T., 70.

[3] 8 B. L. R., 544, (549).

applied for a non-suit on the ground that it appeared upon the charterparty that the defendants were not principals, but only agents of the owner. The Judge held that the defendants were liable as principals. On appeal, it was held that the contract was ambiguous, but when read with the letters, J. H. and Company were personally liable. In *Weidner* v. *Hoggett*,[1] the words "I undertake to load the ship Der Versuch," in an agreement signed "on account of Bebside Colliery, W. S. Hoggett," but which mentioned no person with whom Hoggett was contracting with, although the terms of the agreement were communicated by the charterers to the plaintiff the captain of the "Der Versuch"; held that there was abundant evidence to show that the undertaking was signed by Hoggett and given to the charterers for, and on behalf of, the captain as an undisclosed principal, and that the contract was with the defendant personally, and not as agent It is, however, to be remarked that the decision in *Gadd* v. *Houghton*,[2] although not directly impugning this case, would probably be held to override it.

Bought and Sold notes.—The agent must exercise the same precautions in contracting by means of bought and sold notes to prevent personal liability attaching to his contract, as have been above stated with relation to charterparties.[3] A few instances of such contracts where it has been held that he either has, or has not contracted personally may be given.

Where he signs without qualification he will be liable.—Thus in *Paice* v. *Walker*,[4] the defendants who were brokers, signed a contract for the sale of wheat in the following form:—"Sold A. J. Paice, Esq., London, about 200 quarters wheat, (as agents for John Schmidt and Company of Danzig)

(Sd.) Walker and Strange."

Kelly C. B., said:—"Although it may be difficult to reconcile, I do not say all the cases, but all the dicta in the cases upon the subject, there is no difficulty in extracting from the authorities a very sound rule, and one on which we can always safely act. That rule is well laid down in the note to *Thomson* v. *Davenport*, in 2 Sm. L. C., 6th ed., 344, in these terms, "where a person signs a contract in his own name, without qualification, he is *primâ facie* to be deemed to be a person contracting personally, and in order to prevent the liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." Now to apply that rule to the present case, the contract is here signed "Walker and Strange," without more, therefore without any such qualification as is referred to in the rule I have cited, and that circumstance disposes of the many cases adverted to by Mr. Dodeswell, in which the contract was signed by a person describing himself *in the signature, and as part of it*, as agent. That the incorporation of such

[1] L. R., 1 C P. D., 533.
[2] L. R., 1 Ex. D., 357.
[3] See ante p. 174.
[4] L. R., 5 Ex., 173.

words with, or their annexation to, the signature is the qualification referred to in the first part of the passage I have cited, is shewn by the conclusion of the sentence, where "the other portions of the document" are contrasted with the signature itself. The defendants therefore not signing as agents, is there anything in the contract to bring them within the latter part of the rule I have referred to, and to which I entirely accede, that is, is there anything in the document to show that the defendants did not intend to bind themselves otherwise than as agents. The words relied upon to show this are the words "as agents for J. Schmidt and Co. of Danzig." But numerous cases, and amongst them that of *Lennard* v. *Robinson*,[1] have decided that the use of these words in the body of the contract does not prevent the liability of a party who signs as principal. The rule, therefore, stands thus, that where a contract is signed by a person without any words importing agency, the person so signing is by virtue of the contract both entitled and liable, unless in the body of the contract a contrary intention is clearly shewn." Martin and Pigott B. B. both distinguished the case from *Fairlie* v. *Fenton*.[2] Cleasby J., agreed with the view expressed by the rest of the Court, but said: "I am not disposed to reject or to give less than considerable weight to the fact that this contract shews on the face of it that it was made on account of a foreign principal." The case of *Paice* v. *Walker*[3] has, however, been questioned in *Gadd* v. *Houghton*,[4] a case to which reference will be made later on.

Mere words of description insufficient.—In *Hutcheson* v. *Eaton*[5] the contract was as follows:—"Messrs. Hutcheson & Co. We have this day sold to you the following goods ..... and was signed

Francis J. Eaton & Son, Brokers,"

it was contended that the defendants having signed as brokers were not liable: Brett M. R. said:—According to the authorities, as I understand them, where the contract is drawn up in this way, and the signature is of the name of the persons with "brokers" added, and the contract is not signed "as brokers," they are personally liable: for it said to be a signature on their behalf. and the word "brokers" is only a description.

Cases in which it has been held that the intention of the person making and executing the contract was not to be bound personally.—In *Gadd* v. *Houghton*,[6] the contract was "Mr. James Gadd, we have this day sold to you on account of James Morand and Company of Valencia 2,000 cases Valencia oranges of the brand. .....

(Sd.) J. C. Houghton and Company."

James C. J., said:—"The case is not in my opinion in any way governed by

[1] 5 El & Bl., 125.
[2] L. R., 5 Ex., 169.
[3] L. R., 5 Ex., 173.
[4] L. R., 1 Ex. D., 357.
[5] L. R., 13 Q. B. D., 861.
[6] L. R., 1 Ex. D., 357.

Paice v. *Walker*,[1] for whatever the decision was in that case upon the words "as agents" the words in the present case "on account of" are not at all ambiguous, and it would be impossible to make them words of description. The *ratio decidendi* in *Paice* v. *Walker* was that, having regard to the contract and all the circumstances of the case, the words "as agents" must be considered as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain "on account of" another person. Those are the very words used in the present case. When a man says that he is making a contract "on account of" someone else, it seems to me that he is using the very strongest terms the English language affords to show, that he is not binding himself, but is binding his principal; as to *Paice* v. *Walker*, I cannot conceive that the words "as agents" can be properly understood as impliying merely a description. The word "as" seems to exclude that idea. If that case was now before us, I should hold the words "as agents" in that case had the same effect as the words "on account of" in the present case, and that the decision in that case ought not to stand. I do not dissent from the principle that a man does not relieve himself from liability upon a contract by using words which are intended to be merely words of description, but I do not think that words "as agents" were words of description." Quain J., said:—"It is said that in order to relieve the agent from liability, he must sign "as agent" or "on account of" Morand and Company. I cannot see the necessity for adding those words to the signature if you can gather from the contract that he makes it on account of Morand and Company. These words at the end of the signature would add nothing to what has been stated in the body of the contract." In *Fairlie* v. *Fenton*,[2] above referred to, the plaintiff a broker signed and delivered to the defendants a bought note for cotton in the following form "I have this day sold you on account of Mr. Illins A. Timmins of Manchester ..... (signed) Evelyn Fairlie, Broker" held that he was not a contracting party, and could not sue the defendants for breach of contract in refusing to accept the cotton. Martin B., said:—"I am entirely satisfied, even without authority, that when he states on the face of the contract that he is acting as broker, that is, as a middleman between the two parties, he has no interest, and cannot sue. If he could sue, he could be sued: and it is obvious on the face of the contract that he does not contract to deliver the goods sold, but only that he has authority to enter into the contract on behalf of the principal he names. The words "I have" are of no importance to show him a contracting party." In *Deslandes* v. *Gregory*,[3] already cited with reference to charterparties; the Court held that a contract worded. It is ..... agreed between C. ... and C. D. Brothers "*as agents*

[1] L. R., 5 Ex., 173. [2] L. R., 5 Ex., 169. [3] 2 El. & El., 602.

to E. F., merchants and charterers," and signed "*For E F of—C D. Brothers & agents,*" was conclusive that the defendants did not sign for themselves as principals; and that it would require extremely strong words in the body of the contract to control the effect of the form of signature used.

Cases on a particular custom making an agent who does not disclose his principal personally liable—The cases of *Fleet* v. *Murton*,[1] *Southwell* v. *Bowditch*,[2] *Humphrey* v. *Dale*,[3] *Hutchinson* v. *Tatham*,[4] are all cases in which the words of the contract were insufficient to hold the agent personally liable, had it not been for a proved and admitted custom which made the agent personally liable if he did not disclose the name of his principal. The Indian Contract in s. 230 embodies this custom, and in all cases in this country an agent who does not disclose his principal is *primâ facie* personally liable It is unnecessary therefore to refer to the cases above mentioned, save to say that the contracts in those cases were respectively worded and signed as follows: "Sold for your account to our principals, signed M W. as broker." "Sold by your order and for your account to my principals," signed by the broker without words of description "Sold for Messrs. T and M. to our principals" signed "D. and Company brokers." A charterparty expressed to have been made and signed by the defendants "as agents to merchants"

The same rules are applicable to other contracts.—Thus in *Jones* v. *Downman*,[5] an action founded on a special agreement, the question arose whether the agreement made the defendant personally responsible, or whether it was entered into by him merely as agent for the firm of Esdaile and Company. The agreement in question was contained in certain correspondence, in which the following passages written by the defendants and signed by him personally to the plaintiff occurred, "your bill of charges in this matter ..... I undertake on behalf of Esdaile and Company to pay, and will arrange with you the time and mode immediately after the dividend meetings," and in an earlier part of the same letter, "your bill of costs against ..... I undertake to have paid to you." The Court held that it was impossible to ascertain with certainty from the language of the letter alone, whether it created a personal liability by the defendant or not, and that the case disclosed evidence from which inferences might fairly be drawn in favour of either contention, but that the defendant's authority fell short of sanctioning this particular undertaking, and a verdict was entered for the plaintiff. On error in the Court of Exchequer Chamber where the case is reported as *Downman* v. *Jones*,[6] Tindal C. J., in giving judgment in the case said, "Looking at the terms of the letter itself, and still more, calling in aid the

[1] L R, 7 Q. B., 126.
[2] 45 L. J. C. P. L R., 1 C P., 374.
[3] El. Bl. & El., 1004; 27 L. J. Q. B., 390.
[4] L. R., 8 C. P., 482.
[5] 4 Q. B., 235 (note).
[6] 7 Q. B., 103.

correspondence set out in the special case which preceded and gave rise to that letter, and which may be considered as part of the transaction, we think it imports, upon the face of it, an undertaking made by Downman as agent of the Esdailes; and that it is not to be inferred from the facts found, that there was a want of authority on his part to make such undertaking, or any excess of his authority in making it ..... The very terms of the letter itself "I undertake on behalf of Esdaile and Company, to pay" would seem to us, in their natural meaning, to point rather to a promise made by one person as agent for another than as intended to bind the party speaking in the character of a principal, for upon the latter supposition there would appear to be no reason whatever for mentioning the name of the principal. To say the least, however, the expression is capable of bearing this construction; and when contrasted with the form of expression used by the defendant in the part of the same letter immediately preceding, *viz.*, "your bill of costs *I undertake to have paid to you*," the distinction between the two modes of expression strongly confirm the interpretation we think it demanded itself"

In the case of an unwritten agreement, the question whether the agent is a party to a contract, is a matter of inference from the circumstances.—In *Williamson* v *Barton*[1] the plaintiff put up at auction his farm produce. The defendant bid, and hay and corn were knocked down to him as the highest bidder, whereupon the auctioneer, asked him his name, and on learning it, the auctioneer believing the defendant was bidding for himself wrote his name in his book as purchaser. The plaintiff who was present at the auction had on previous occasions sold to the defendant other goods on behalf of one Smith a contractor to whom he was foreman, and he the plaintiff took no objection to the present sale. The fodder was fetched away by Smith's carts and was consumed by Smith's horses. In an action for goods sold and delivered, the defendant pleaded that he had bought the hay and corn not for himself, but for Smith, The Court left it to the jury to say whether the defendant had authorized the auctioneer to sign his name as the purchaser of the goods, telling them that if they were of that opinion, the defendant was liable for the price, but that if they should think that although the defendant entered into a binding contract, the evidence showed that the goods were delivered not to the defendant, but to some one else, he was not liable. The jury found for the defendant In a rule obtained for a new trial for misdirection, Wilde B. and Channell B. were of opinion that the defendant made himself personally liable; he had communicated to no one that he was acting as agent, or did nothing by word or act indicating that he was not contracting himself and for himself, Bramwell J. said: "No doubt a person who is acting for another and known by him with whom he deals to be so

[1] 7 H. & N., 899.

acting, may and will be personally liable if he contracts as a principal, and that whether he contracts as a principal, and that whether he contracts by word of mouth or writing. The difference, is that if the contract is by word of mouth, it is not possible to say from the agent using the words "I" and "me" that he means himself personally: whereas if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and he is taken to do so; and then the other party is bound to him. Therefore if the defendant had himself in this case signed the conditions of sale as a purchaser, it may be conceded that he would have been liable, but the plaintiff would also have been bound to him. But he did not sign the conditions of sale himself; they were signed by the auctioneer's clerk and unless the auctioneer's clerk had authority from him so to sign his name, the defendant is not bound by that signature. His Lordship therefore held that the question was properly left to the jury to say whether the defendant authorized the auctioneer to write his name as purchaser. And that although the defendant entered into a binding contract, if the goods were delivered, not to him, but to some other person, he was not liable; Pollock C. B. held that there was evidence from which the jury might infer that the defendant did not purchase the goods on his own behalf, but as agent only. The Court being equally divided in opinion, the rule dropped.

The effect of bought and sold notes.—The question whether bought and sold notes alone constitute the contract, is of some difficulty, the Indian cases on the subject are few in number, and are all cases arising in Calcutta. And having regard to the decision of *Cowie* v. *Remfry*,[1] which appears to show a particular custom with regard to these notes, I propose to state first, what the Indian cases on the subject appear to decide, shortly referring hereafter to the leading case upon the subject in England.

Where the notes differ.—In *Tamvaco* v. *Skinner*,[2] the bought and sold notes did not agree, the bought note containing the words "bought for order of J. S. and Company silk ..... as much as *they may* supply of November and March bund;" the sold note "..... *as much as you can supply*" of that bund; the report is silent as to whether any entry was made by the broker in his book, or whether such entry or any evidence other than the notes were before the Court. The Court held that the bought and sold notes did not constitute a contract binding on J. S. and Company to supply silk of either the November or March bund at a loss. This case is therefore an authority that where bought and sold notes are at variance and there is no other evidence of the contract, there is no contract.

Where a bought note is in existence only.—Next comes the case of

[1] 3 Moo. I. A., 448.

[2] 2 Ind. Jur. N. S., 221.

Mackinnon v. *Shibchunder Seal*,[1] which decides that the broker's bought note is not alone sufficient to make a contract.

Custom in Calcutta to contract by bought and sold notes.—The case of *Cowie* v. *Remfry*,[2] is an important case as it decides that the custom of merchants at Calcutta is to contract by bought and sold notes, and points to the fact that such notes alone form the contract; and further decides that where there is a variance in the bought and sold notes there is no contract. In that case, Cowie and Company, engaged to purchase from Remfry a certain quantity of indigo, the contract between the parties being carried through by a broker, who delivered a sold note for the approval of Remfry; the sold note was as follows, "We have sold for you to Cowie and Company, ..., indigo ..... price 205 Company's Rupees per factory maund free of brokerage, with the usual allowance on rejections, *viz*, on broken, chest, washings, and on stuff inferior to the *usual* run of the parcel" ..... Remfry or a member of his form, objected to the word "*usual*" being inserted, and the broker thereupon took the sold note to Cowie and informed him of Remfry's objection. Cowie struck his pen through the word objected to by Remfry, placing his initial over the erasure, and returned the note to the broker, who thereupon delivered it so altered to Remfry. The broker delivered, on the following day, a bought note which differed in certain material terms from the sold note. In a suit brought by Remfry against Cowie for non-performance of the contract contained in the sold note evidence respecting the custom of merchants at Calcutta to deliver bought and sold notes was given, this evidence was, however, very conflicting, but the Court decided the case in favour of the plaintiff, considering that the evidence in favour of the custom to deliver bought and sold notes preponderated, but held that the sold note alone formed the contract. On appeal the Judicial Committee held that, according to the custom prevailing amongst merchants at Calcutta, the contract should have been by bought and sold notes, and that the necessary inference was, that the parties had intended to contract according to that custom; further that the actual, dealing between the parties corresponded with the custom, as bought and sold notes had been delivered; that the contract was not, as held by the lower Court, evidenced by the sold note alone, but was a contract by bought and sold notes according to the custom in use; that the submission of the sold note to Cowie, was not for the purpose of considering if it contained his intentions, but solely and exclusively for the purpose of asking Cowie's consent to the removal of the word "usual"; that this could not be considered a proof of knowledge of contents and consent to be bound by the whole instrument, abandoning the usual mode

[1] Bourke O. C. 354.

[2] 3 Moo. I. A., 448.

of contract by bought and sold notes: that the contract being contained in both the notes, and there being a material variance between them, no binding contract had been effected.

There may be cases in which bought and sold notes have been made but which do not nevertheless constitute the contract.—*Clarton* v. *Shaw*,[1] decided in 1872, is an authority showing that the parties may intend to contract, and may have contracted previously to the delivery of the bought and sold notes, and should these notes be at variance, parol evidence may be given of the terms of the contract. There the broker made no entry of the contract in his book, and there was a material variance in the bought and sold notes delivered; the notes were accepted and retained by the plaintiff and the defendant respectively; in a suit brought in the Small Cause Court by the plaintiff for non-delivery under the contract, the plaintiff proposed to show by parol evidence what the contract between the parties really was; this evidence the First Judge refused to allow considering that the fact of the interchange of brought and sold notes showed it to be the intention of the parties that the terms of the contract should be reduced to writing, and that everything which passed between the parties through their broker previously could only be looked upon as the early stages of the negotiation; the Second Judge, however, considered that for the reasons given by Erle J, in *Sivewright* v *Archibald*,[2] parol evidence as to what the parties really intended to be their contract was admissible. The two following questions therefore were referred to the High Court for decision (1) whether, it was open to the plaintiff to prove by parol evidence the existence and terms of a contract on which he might maintain his suit? and (2) whether bought and sold notes materially varying are not, when received and retained by the parties, conclusive evidence, that in the last stage of their negotiations, the parties did intend to make, and believed themselves to have made a contract, but failed to do so? Couch C. J., said: It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence, the existence and terms of a contract on which he could maintain the action. In *Sivewright* v *Archibald*,[3] a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Erle J.'s opinion that the mere delivery of bought and sold notes does not exclude other evidence of the contract in case they disagree, was in accordance with that of the other Judges..... There may be a binding contract, if the parties intend it, although bought and sold notes are to be exchanged, or a more formal contract is to be drawn up This is shewn by *Heyworth* v. *Knight*.[4] If the bought and sold notes do not agree, they cannot

[1] 9 B. L. R., 245.
[2] 20 L J Q. B., 529.
[3] 20 L. J. Q. B., 529.
[4] 33 L. J. C. P., 298.

be used as evidence of the contract, but we cannot agree with the First Judge that their differing, and not being returned is positive evidence that, at the conclusion of the negotiation, the parties did not agree; the fact being, as we think, that the negotiation was concluded, and the contract made, before the notes were written, and that they were sent by the broker to his principals by way of information. To support the opinion of the First Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged."

Bought and sold notes do not necessarily constitute the whole contract.—In *Jumma Doss* v. *Srenath Roy*[1] which was a suit brought to recover monies due under certain small transactions, which the plaintiff alleged to have been lent to the defendant on the pledge of shares between April and September 1883; and further alleged that the defendants between October 1883 and March 1884, made certain payments to him, and that on the 5th March it was agreed between them that the plaintiff should take over at the market price of the day all the shares of the defendant which he held; this was done, and the plaintiff sued for the balance due to him. The defendant denied that there was any loan, and contended that the transactions were out and out sales to the plaintiff, there being, however, at the time of each sale, a contract by bought and sold notes by which the plaintiff agreed to resale the shares at a future date at an enhanced price; evidence was tendered to show the nature of the contract made between the parties, and to show that the bought and sold notes did not constitute the whole contract, this was objected to on the ground that the contracts being reduced into writing, no evidence was admissible other than the bought and sold notes. Trevelyan J., held that the transaction was a *sutta* one, *i. e.*, sales for cash, and re-purchase for time. And on the question of the admissibility of the evidence (the decision on this point being given decided at the time the question arose), said:—"The first question is whether the terms of the contract have been reduced to take the form of a document? If the parties have intended to reduce all the terms of the contract into writing, then no parol evidence is admissible, but if they intended only to reduce into writing a portion of the terms of the contract, then I think they are entitled to give parol evidence of the terms which they did not intend to reduce into writing. Now when bought and sold notes are exchanged, is it usually intended that these notes should constitute the whole of the contract? I think not, Mr. Benjamin in his work on the law of sales lays down as the result of the authorities that the bought and sold notes do not constitute the contract. I think that proposition is clearly borne out by the case of *Sievewright* v. *Archibald*[2] (see especially the decision of Mr. Justice Earle in that case) and also by the

[1] I. L. R., 17 Calc., 176 (note).

[2] 20 L. J. Q. B., 529.

case of *Panton* v. *Crofts*[1] In both these cases the distinction between making a contract and a memorandum shewing that the contract has been made is pointed out. Then the result of these cases is that a broker's note as a memorandum may satisfy the Statute of Frauds, but not exclude parol evidence. In *Clarton* v. *Shaw*,[2] Sir Richard Couch and Markby J , treated the bought and sold notes, not as the contract, but as information sent by the broker to his principal. Of course bought and sold notes unobjected to may be evidence of the contract, but they do not necessarily constitute the whole contract Although they differ, *Clarton* v. *Shaw* shows that parol evidence of the contract may be given ..... "I do not think s. 92 of the Evidence Act applies to this case. I think it applies only to cases where the whole of the terms of the contract have been intended to be reduced into writing. I think this is shown by the words "adding to" which run in that section; if it were not for those words I should have been inclined to hold that s. 92 only excluded evidence contradicting, varying, adding to or subtracting from such of the terms as had been reduced into writing. The question which has given rise to this argument, is in my opinion admissible."

As a general rule bought and sold notes when they agree do constitute the contract when the broker's authority is clear.—In the case of *Jadu Rai* v. *Bhubotarun Nundy*,[3] Mr. Justice Pigot says:—"In *Sivewright* v. *Archibald*, the bought and sold notes were inconsistent with one another; it seems to have been the opinion of the Court that the contract between the parties might well have been proved in some other way, if there was one, and if it could be proved so as to satisfy the Statute of Frauds. This, and the other cases on this subject, go no further than to show that there may be cases in which bought and sold notes have been made, but in which they do not, nevertheless, constitute the contract. But as a general rule, when they agree, they do. Lord Campbell in *Sivewright* v. *Archibald*,[4] says that where the bought and and sold notes agree, it has been held that they constitute the contract. It may perhaps be a question, looking at the case of *Cowie* v. *Remfry*,[5] which governs this Court, whether in Calcutta, bought and sold notes do not by custom presumably constitute the contract, unless this be disproved, once the authority of the broker is established. At any rate, where the authority of the broker to act for both sides is clear, where the bought and sold notes agree, and have been entirely acquiesced in, there can be no doubt that, at least so far as their contents go, they do constitute the contract."

Effect of the Indian Cases.—It appears, therefore, from the above cases, that where the bought and sold notes agree, they, as a general rule, constitute the contract. That in Calcutta there is a question whether the bought and

[1] 33 L. J. Ch. D , 189.
[2] 9 B L. R., 252.
[3] I. L. R., 17 Calc., 173.
[4] 20 L. J. Q. B., 529.
[5] 3 Moo. I A., 448.

sold notes do not presumably constitute the contract, unless it be disproved, once the authority of the broker is established;[1] but that at all events where they agree, and have been acquiesced in, and the authority of the broker is established, they, so far as their contents go, constitute the contract.[2] That neither a bought or a sold note alone constitutes the contract.[3] That where the bought and sold notes are at variance, and there is no other evidence of the contract, there is no binding contract between the parties,[4] that where they vary they cannot be used as evidence of the contract, but there may, nevertheless, be a contract binding on the parties, which may be proved by parol evidence. That parol evidence will not be admitted to add terms inconsistent with bought sold notes which are at variance;[7] The cases which decide that the bought and sold notes do not necessarily constitute the contract are those of *Jumna Doss* v. *Sreenath Roy*[6] and *Clarton* v. *Shaw*[5] in the former case the bought and sold notes in evidence agreed with one another, and evidence was admitted to show that the bought and sold notes did not constitute a sale but a pledge. But the case of *Cowie* v. *Remfry* was not cited to the Court, and at that time the case of *Jadu Rai* v. *Bhubotaran Nundy* had not been decided.

Sivewright v. Archibald.—This effect of bought and sold notes and the entry in the broker's book, have been much discussed in England, and it is not out of place therefore to refer to the case of *Sivewright* v. *Archibald*.[7] There a contract was entered into between the plaintiff and defendant by a broker, who delivered to the defendant a bought note in which the thing bought was named Scotch Iron, and to the plaintiff a sold note in which the thing sold was named Dunlops Iron; the plaintiff declared on the sold note for breach of contract in that the defendant would not accept or pay for the iron when tendered: There was no signed entry of the contract in the broker's book, and the bought and sold notes being at variance, the defendant objected that there was no contract; the plaintiff contended that the defendant had ratified the contract by requesting to be released from the contract; the declaration was then amended to agree with the bought note, and the jury found a verdict for the plaintiff, stating that the defendant had ratified the contract alleged in the declaration. A rule was obtained to set aside the verdict, on the ground that in cases where a contract has been made by a broker, and bought and sold notes delivered, they

[1] *Jadu Rai* v. *Bhubotarun Nundi*, I. L. R., 17 Calc., 173.

[2] *Cowie* v. *Remfry*, 3 Moo. I. A., 448. *Jadu Rai* v. *Bhubotarun Nundi*, per Pigot J., *supra*.

[3] *Mackinnon* v. *Shib Chunder Seal*, Bourke, O. C., 354.

[4] *Tambaco* v. *Skinner*, 2 Ind. Jur. N. S., 221.

[5] *Clarton* v. *Shaw*, 9 B. B. R., 245

[6] I. L. R., 17 Calc., 176 (note).

[7] 20 L. J. Q. B., 529.

alone constituted the contract, and that all other evidence of the contract was thereby excluded, and that if the notes varied, the contract was disproved, and secondly, that, if evidence was admissible, there was no evidence of ratification of the contract alleged. Lord Campbell, C. J., Patteson, J., and Wightman, J., held that there was a material variance between the bought and sold notes, and therefore, that they did not constitute a valid contract; and that even assuming there was evidence of a parol agreement, there was no sufficient memorandum in writing, within the Statute of Frauds, to make such contract binding upon the defendant. Further that as between buyer and seller when the bought and sold notes signed and delivered by a broker acting for both parties agree, and there is no signed entry of the contract in the broker's book, the bought and sold notes are the memorandum in writing which satisfies the Statute of Frauds; but when they materially vary, there is no such binding contract, and neither the bought note delivered to the buyer, nor the sold note delivered to the seller, can then be treated by itself as such memorandum in writing. Their Lordships further held that an entry of a contract made in the broker's book, and signed by him, constitutes the binding contract between the parties; and a variance between it, and the bought or sold note afterwards delivered by the broker would not affect its validity Erle, J., was of opinion that bought and sold notes signed and delivered by a broker acting for both parties, who has made no signed entry in his book of the contract, are not, by presumption of law, without other evidence of intention, a binding contract in writing, and do not exclude other evidence of the contract, and of a compliance with the Statute of Frauds in case the bought and sold notes materially vary—holding that the plaintiff was entitled to succeed, on the ground, either that the bought and sold notes did not substantially vary, or that the bought note which stated the substance of the contract, was a sufficient memorandum within the Statute of Frauds to bind the defendant. The majority of the Court further found that that was no sufficient evidence of subsequent ratification by the defendant.

The authorities for holding that the entry in the broker's book constitute the contract, were at one time abandoned,[1] but the strong opinions expressed by the Court in *Sivewright* v. *Archibald*[2] appear to have re-instated the broker's entry as the contract.

Signature in point of form.—As regards the sufficiency of the signature in point of form; this does not seem provided for exhaustively by any Indian enactment In *Geary* v. *Physic*,[3] a signature in pencil has been held sufficient. Abbott C. J., said:—"There is no authority for saying that where the law

[1] See *Hodgson* v. *Davies*, 2 Camp, 531. *Goon* v. *Aflalo*, 6 B. & C., 117. *Thornton* v. *Meux*, M. & M, 44. *Hawes* v. *Foster*, 1 Moo. & R., 368.

[2] 20 L. J. Q. B., 529.

[3] 5 B. & C., 234.

requires a contract to be in writing, that writing must be in ink. The passage cited from Lord Coke (Co. Litt. 229 (*a*)) shews that a deed must be written on paper or parchment,[1] but it does not shew that it must be written in ink. That being so, I am of opinion that an endorsement on a bill of exchange may be by writing in pencil. There is not any great danger that our decision will induce individuals to adopt such a mode of writing in preference to that in general use. The imperfection of this mode of writing, its being so subject to obliteration, and the impossibility of proving it when it is obliterated, will prevent its being generally adopted. There being no authority to show that a contract which the law requires to be in writing should be written in any particular mode, or with any specific material, and the law of merchants requiring only that an endorsement of bills of exchange should be in writing, without specifying the manner in which the writing is to be made, I am of opinion that the endorsement in this case was a sufficient endorsement in writing within the law of merchants." Under section 2 of Act XIV of 1882, the word "signed" is defined as including "marked, when the person making the mark is unable to write his name": and it also includes "stamped with the name of the person referred to." And under s. 3 of Act I of 1887, the word "sign" with its grammatical variations and cognate expressions, is defined with reference to a person who is unable to write his name, as including "mark" with its grammatical variations and cognate expressions.[2]

PART II.

CONSTRUCTION OF THE AUTHORITY.

General rules for formal instruments.—There are some few rules which have been laid down for the construction of the authority given to the agent, which must be carefully attended to. Firstly, where the authority is given by a formal instrument, such, as a power of attorney, it has been laid down that the authority given thereby must be construed strictly; the special purpose for which the power is given is first to be regarded,[3] and the most general words[4] following the declaration of that special purpose, will be construed to be merely all such powers as are needed for its effectuation,[5] yet the authority will, even without the assistance of general words, be held to include all the means neces-

[1] See also s 3, Act I 1872. "Document" and s. 2 of Act XIV of 1882.

[2] See *Benares, Rajah of* v. *Debi Dyal Noma*, I. L. R., 3 All., 575, and *Queen Empress* v. *Janki Prasad*, I L R, 8 All., 293.

[3] *Lewis* v. *Ramsdale*, W. N., (1886), 118.

[4] *Sheoratan Kuar* v. *Mahipal Kuar*, per Mahmood J., I. L. R., 7 All, 258, (270).

[5] *Judah* v. *Addi Raja Queen Bibi*, 2 Mad., H. C, 177. *Attwood* v. *Munnings*, 7 B. & C., 278, (284). *Perry* v. *Holl*, 6 Jur. N. S., 661.

sary to attain the accomplishment of the principal power.[1] And in construing words in a power of attorney the rule applicable to other documents, that the words must be looked at in connection with the context as well as with the general object of the power, must not be lost sight of.[2]

I. The power must be construed strictly, the special purpose for which the power is given first to be regarded, and general words following that special purpose to be construed as being all such powers as are needed for its effectuation.—In *Keshav Bapuji* v. *Narayan Shamrao*[3] a power appointing a muktar a true and lawful attorney "to make accurate inquiries as regards the lands of a certain village mortgaged by the donor, and to redeem the same, to sue or make petition, to make an appeal, or special appeal, and to answer and sign for the donor, and to pass all manner of documents, and to register &c. the same, and to do other work in connection with the same wherever the same may be required to be done, which, the donor, if present, would have been called on or permitted to do," was held not to authorize the mooktar to enter into an engagement with a pleader to pay him Rs. 99 as reward on the day of decision of the case instituted to redeem their lands even though the suit be amicably settled. Sarjent J., saying that a mere power to sue would not authorize an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration, and that as to the power "to pass all manner of documents and to have them passed in connection with the lands and to register the same," such a power was by its very terms confined to documents relating to the lands which the client was anxious to recover and not to the suits to be brought to recover them. So a power authorizing the execution of bonds in lieu of former debts does not authorize the execution of a bond to secure a debt already barred by limitation.[4] Again where a jemadar gave to his brother a power of attorney "to conduct cases on his behalf, to appoint any pleader or muktear, to receive money deposited and due to him from the Courts, to act in dakhil-kharij cases, to purchase villages under decrees, to file receipts and razeenamahs, acquittances and other documents." The donee of the power referred a pending suit to arbitration; Mr. Justice Turner and Mr. Justice Broadhurst said "the language of a written document of this nature when distinct must have its proper effect" ..... "in our judgment it is going too far to hold that these terms authorized the attorney to refer question to arbitration."[5] In *Budh Singh Dudhuria* v. *Denendranath Sancul*[6]

[1] *Howard* v. *Bailie*, 2 H. Bl., 618, (619).

[2] *Jonmenjoy Coondoo* v. *Watson*, I. L. R., 10 Calc., 901, (911).

[3] I. L. R., 10 Bom., 18.

[4] *Hubbal Sukul* v. *Ramgoti Dey Roy*, 11 C. L. R., 581.

[5] *Thakoor Pershad* v. *Kala Pershad*, 6 N. W. P. H. C., (1874), 210.

[6] 11 C. L R., 323.

under a power of attorney executed by twenty proprietors of a joint estate, empowering their general manager "to raise loans for the purposes of the estate upon bonds, and to sign their names, or his name on their behalf, and to pledge the whole or any part of the estate by such bonds" the attorney executed a bond on behalf of three of the proprietors; Garth C. J., and Bose J., held that the manager was not authorized to execute a bond on behalf of any one or more of the proprietors making him or them responsible for the whole money borrowed to the exclusion of the rest; and that in a suit upon a bond so executed the plaintiffs were not entitled to rely upon the general power which the manager might have, as the manager's authority must be considered as strictly confined to the terms of the power of attorney. In *Tyebunnissa* v. *Kaniz Fatima*[1] a power was given to a mooktar "to, in his discretion, appoint or dismiss Karendas, to make arrangements for khas collections, or grant ticca and ijarah leases, and when advisable, sell, mortgage and make gift of the whole or portion of the right of the proprietors." Under this power the mooktear granted a permanent tenure; held by Mitter and Tottenham J. J., that so far as creating undertenures, the authority given to the mooktar under the power was limited to the granting of ticca and ijarah leases; that there was abundant authority for the proposition that a power to sell would not authorize a mortgage; and the same reason would warrant the Court in holding that the power to sell or mortgage would not render a permanent tenure created by the mooktar valid. That as to the power of "making gift," it was but reasonable to hold that it authorized the agent formally to execute a deed of gift only when the disposing power had been exercised by the principals; and that the agent had no power under the power to exercise the power of disposition by gift by his will and determination quite irrespective of the concurrence of the ladies; and their Lordships concluded their judgment by saying that the cases of *Sudisht Lal* v. *Sheobarat Koer*[2] and *Ram Narain Poldar* v. *Ramnauth Shaha*[3] show that a power of this kind must be strictly construed against the grantee.

A power to sell is a power to sell in the ordinary course of business. —In *Jumma Dass* v. *Eckford*,[4] the plaintiff Eckford deposited with his agents Nichols and Company twenty-five shares in the Muir Mills Company and gave to the members of the firm of Nichols and Company a joint and several power of attorney authorizing them or either of them, amongst other things, "for him and in his name, and on his behalf, to purchase, sell, endorse, assign and transfer" all shares standing in his name in the books of any public Company or Society. One of the members of the firm of Nicholl and Company entered into a contract for the sale of these shares with the defendant embodied in

[1] 13 C. L. R., 247.
[2] L. R., 8 I A 39.
[3] 2 W. R., 231.
[4] 1 L. R., 9 Calc, 1.

the following bought and sold notes. "Calcutta, 24th January, 1881. Sold this day by order and for account of Messrs. Nicholl and Company to Jumma Dass twenty-five shares in the Muir Mills Company at Rs. 200 per share, delivery and payment to-day." "Calcutta January 24th 1881." Bought this day by order and for account of Messrs Nicholl and Company from Jumma Dass, twenty-five shares of the Muir Mills Company at Rs 205 per share; delivery and payment on the 25th March, 1881. Such member of the firm transferred these shares under three transfer deeds executed by him in the name of the plaintiff to the defendant and received the price thereof. The defendant did not attempt to register the transfer of these shares until after the insolvency of Messrs. Nicholl and Company. The plaintiff then brought a suit to recover these shares from the defendant; and the latter contended that the power of attorney authorized Nicholl and Company to do what they had done with the shares. It appeared from the evidence that Nicholl and Company had instructed their broker not to sell the shares at the bazaar rate, but to sell them and buy them back; and the transaction had been entered in the books of Nicholl and Company under the head "credit loan payable account." White J., was of opinion that the words "purchase, sell, endorse, assign and transfer should be read on the authority of the *Bank of Bengal* v. *Fagan*,[1] disjunctively, and that on the authority of *De Bouchout* v. *Goldsmid*,[2] these words would not convey a power to pledge or mortgage the shares; that the broker had no authority to make an out and out sale, but had only authority to sell and buy back; and rested his judgment, which was for the plaintiff, on the ground that the defendant had failed to show that the member of the firm of Nicholl and Company had made any contract for the sale of the plaintiff's shares, the contract being made in the name of Nicholl and Company. On appeal before Garth C. J. and Wilson J., Garth C. J., held that the transfer was made in a transaction which was clearly unauthorized by the power, and which was not made for or on behalf or in the name of the plaintiff. Wilson J., said:—"A power to sell is, I think, only a power to sell in the ordinary course of business, that is to say, for a money-price, but the sale here was partly for a money-price, and partly in consideration of the sale of like shares at a future day. On this ground I think the transaction was not within the power."

Construction of Power to sell, endorse and assign—But where the payee of promissory notes of the East India Company, transferable by endorsement and payable to bearer authorized his agents at Calcutta by a power of attorney, "to sell, endorse and assign" the notes; and the agents, in their character of private bankers, borrowed money of the Bank of Bengal, offering as security

[1] 5 Moo. I A., 27.

[2] 5 Ves., 211.

these promisory notes. The Bank made the advance, and the agents endorsed the notes, such endorsement purporting to be as attorney for their principal, and *deposited* them with the Bank by way of collateral security for their personal liability, at the same time authorizing the Bank, in default of payment to sell the notes in re-imbursement of the advances. The agents subsequently became insolvent, and default having been made in payment, the Bank sold the notes and realized the amount of the loan, held that the endorsement of the notes by the agents was within the authority given to them by the power of attorney and that the payee could not recover in detinue against the Bank.[1]

A power to sell or mortgage does not include a power to give a simple money bond.—In *Poorna Chunder Sen* v. *Prosunno Coomar Dass*,[2] the plaintiff gave a power of attorney authorizing his cousins in the following words, "for me and in my name to give all kinds of pottas to tenants, to sell or mortgage at his or their discretion any part of my estate for the payment of my debts, to ask, demand, recover and receive any sums due to me to pay any amount due by me, giving and by these presents granting to my attorneys and attorney my sole and full power and authority to take, pursue, and follow, such legal course or any other course at their or his discretion towards recovering, receiving, and obtaining of any dues and payment of my debts as I myself might or could do were I personally present ..... and in my name to make, sign, seal and deliver any document necessary to be taken or given; and further to do, perform, and finish for me and in my name, all and singular things and thing which shall be or may be necessary, as entirely as I in my own person might or could do in or about the premises, ratifying, confirming and allowing whatever my said attorney or attorneys shall wilfully do or cause to be done in or about the execution of the above mentioned objects." The attorneys executed a simple money bond to one of the creditors of the donor of the power for payment of a sum due to him. Garth C. J., said; "We are bound to construe the language of an instrument of this kind with reasonable strictness; and we think it is impossible to say that a power to sell or to mortgage property includes a power to give a simple money bond, which is an instrument of a totally different nature, and which in fact is not a means of paying debtors at all."

Recital controlling generality of operative part of an instrument — In *Danby* v. *Coutts and Company*[3] the operative part of a power of attorney appointed two persons to be the attorneys of the plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the

[1] *Bank of Bengal* v. *Fagan*, 5 Moo. I, A., 27. *Bank of Bengal* v *Macleod*, 5 Moo I A, 1, cases on similar powers of attorney and decided by one judgment.

[2] I. L R, 7 Calc, 253, 8 C. L. R, 443.

[3] L. R, 29 Ch D, 500.

plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence: and it was there held by Kay J., that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the plaintiff's absence from the country

As to the construction of general words.—In *Harper* v. *Godsell*,[1] a partner in the form of B. W. and Company, gave to another person a power of attorney "for the purpose of exercising, for me, all or any of the powers and priveleges conferred by an indenture of partnership constituting the firm of B. W., and Company, and generally to do, execute, and perform any other act, deed matter or thing whatsoever ..... in or about my concerns, engagements and business of every nature and kind, whatsoever" Lord Blackburn said that the power did not authorize the excution of a deed dissolving the partnership; that the special terms of the first part of the power prevented the general words from having an unrestricted general effect; and that the meaning of the general words was cut down by the context in accordance with the ordinary rule of *ejusdem generis*, which general principle was laid down in *Arlington* v. *Merricke*.[2] Again where the mother and guardian of an infant defendant gave to her agent a power of attorney by which she authorized him, "for her and in her name and on her behalf to appear in or sue or defend and to receive all papers and process in any suit, appeal, or special appeal, or other judicial proceedings whatsoever in any Court, and to act in all such proceedings in any way in which I might, if present, be permitted or called on to act." The agent entered into an agreement with a vakil to pay him Rs. 4,000 if the appeal was decreed in full in favour of the infant; and in case a less sum should be decreed than that fixed by the decree of the lower Court, then that he should be paid one-fourth of the difference; and lastly that if any money should be ordered to be paid to the appellant by the respondent, then that such sum should be paid to the vakil in addition to the Rs. 4,000. The decree of the lower Court was reversed and the infant's estate was benefitted to the amount of Rs. 21,487. In a suit by the vakil to recover under this agreement, Sargent J., said:—"It can scarcely be doubted,..... looking at the whole of this instrument that the particular object of it is to enable the attorney to represent the party to the suit in all judicial proceedings to the same extent as the party himself if present might be permitted or called upon to do. Authority is given, it is true, to sue and defend, but these words must, as Mr. Justice Story says in his work on Agency, be construed in subordination to the particular subject matter in connection with which they are used; here from the position which they occupy, they plainly denote the

[1] L. R, 5 C. P, 422.

[2] 2 Wm. Sanders, 411, (*a*) 813; *but see the remarks of Fry L J as to this in Hutcheson* v. *Eaton*, L R. 13 Q. B. D 861

two-fold character of plaintiff or defendant in which the attorney may be called upon to appear and act in any suit, appeal, or special appeal, or other judicial proceeding whatsoever in any Court; and whatever acts might otherwise be properly included in the expression, "sue and defend," if they stood alone, they are here clearly confined to acts done in the above proceedings ..... Assuming, however, that the words "sue and defend," should, as was contended for the plaintiff, be read apart from the context which limits them, as we think, to acts done in judicial proceedings, we should equally find it impossible to construe them as authorizing the execution of the bond in question. It was then said that a power to sue would authorize the appointment of a vakil, and that as special arrangements with vakils for the remuneration of their services are allowed by law and are of every day occurrence, the bond was, therefore, within the power as one of the usual and appropriate means for accomplishing the object of the agency. But the general rule, which allows of the agent resorting to all usual means for carrying out his agency, has always received a restricted application in construing formal and deliberate instruments of this sort as distinguished from ordinary documents conveying instructions and letters of advice which are of such constant use in commercial matters."..... In this case, however, the decision was more particularly grounded on the fact that the authority was given by a person in a representative character and for and on behalf of the estate of a minor.[1]

Construction of general words.—In *Lewis* v. *Ramsdale*,[2] the defendant executed in favour of one Locke a power of attorney for the purposes hereinafter expressed, that is to say, "to sell, let, and manage real estate, and to sell, and convert into money personal estate and effects, and to enter into, sign and execute any contract or deed that might, in the opinion of the attorney, be necessary or proper for effectuating the purposes aforesaid, or any of them, and for all or any of the purposes of these presents to use the name of me the said ———— and generally to do, execute, and perform any other act, deed, matter or thing whatsoever which ought to be done, executed or performed, or which, in the opinion of my said attorney, ought to be done, executed or performed in or about my concerns, engagements, and business of every nature and kind whatsoever, as fully and effectually to all intents and purposes as I myself could if I were present and did the same in my proper person." Upon the execution of this power the defendant left with Locke a promissory note, some share certificates, and paintings. Locke purporting to act under the power of attorney executed a mortgage of the promissory note, shares and paintings to the plaintiff; held by Stirling J., that the mortgage was not within the power of attorney, and that the "purposes" for which the power was given were clearly stated; that

[1] *Rav Saheb V. N Mandik* v. *Kamalja Rai*, 10 Bom. H C., 26.

[2] W. N. (1886), 118.

the general clause was prefaced with the words "and for all or any of the purposes of these presents" which governed the whole clause and referred to the special purposes defined

The words must be looked at in connection with the context as well as with the general object of the power.—In *Watson* v. *Jonmejoy Coondoo*,[1] the plaintiff Watson gave to the members of the firm of Messrs. Nicholls and Co. a power of attorney authorizing them jointly and severally to "negociate, make sale, dispose of, assign and transfer, all or any of the Government promissory notes or other Government paper, bank shares or shares in any public Company, and other stocks, funds and securities of any description whatsoever now or hereafter standing in my name ..... and for the purposes aforesaid or any of them to sign for me and in my name and on my behalf, any and every contract or agreement, acceptance or other document." One of the members of the firm of Messrs. Nicholl and Co., (Thompson) without the knowledge or authority of the plaintiff pledged these securities to the firm of Ameer Sing Shamah Mull as security for an advance of Rs. 19,000, and executed as attorney for Watson a promissory note for the amount of the loan, and the said firm on the same day transferred the note and security to the defendant. The plaintiff brought a suit to recover his securities or the value thereof. Mr. Justice Wilson said;—"The real question here is, whether the word "negociate" necessarily requires the discounting of a bill, or whether the word is satisfied by a pledge as in this case. It appears to me that the word "negotiate" is sufficiently wide to cover a transaction such as that which took place in this case. We are speaking of a class of documents long known as negotiable instruments, and I think the word "negotiate" used in such an instrument means to deal with as a negotiable instrument by endorsement, if the instrument is such as to require endorsement, by delivery if it passes by delivery, and in my opinion that may be by an out and out sale or by pledge. I think therefore that the word "negotiate" covers such a transaction as this ..... and that the power of attorney was sufficiently wide to cover the transaction. On appeal White J. said; This word (negotiate) is in the power allied with the words "make sale, dispose of, assign and transfer." Each of these words, according to the decision of the Privy Council in the *Bank of Bengal* v. *Fagan*[2] is to be read disjunctively, and the powers conveyed by these words to be treated as joint and several ....." his Lordship after expressing a doubt whether the term "negotiate," ought not to be confined in its application to that class of property, which was described in the power as "securities of any description" and to such of them only as were ordinarily said to be negotiated when they were transferred or put in circulation, said;—"Taking the term, however, to be applicable to a Go-

[1] I. L. R., 8 Calc., 934. [2] 5 Moo. I. A., 27.

vernment promissory note, and that such a note stands in the same position as an ordinary commercial note, did the word "negociate" confer upon the donee of the power, authority to do what he did in the present case in the plaintiff's name? ..... The word "negotiate" if applicable to such property as Government Paper or Government Promissory Notes, did not, in my opinion, authorize the donee of the power to do more than put the paper on the market; and if necessary for that purpose to endorse it in the name of the plaintiff. In the transaction here entered into with the defendant it was not put on the market or put in circulation; it was deposited as a security for money borrowed. It was an essential part of the transaction between Thompson and the defendant that the latter should keep the paper out of the market, and with himself, ready to be returned when the loan was paid off, or when he sought to redeem the paper. The defendant's contention is, that that if the word "negotiate" does not of itself authorize the transaction, it does so when coupled with the words lower down in the power of attorney, which run thus "and for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract, agreement, acceptance or other document." These are general words ..... The authorities cited at the bar show that these general words are not to be construed as enlarging the authority of the donee of the power, but are to be confined strictly in the doing of things necessary to be done in performing the acts authorized by the power The defendant having failed to, in my opinion, show that pledge of the Government note was authorized by the power of attorney, it follows that he acquired no title to the note by its delivery to him ....." His Lordship, however, in addition to the ground last mentioned held that the loan which was the principal transaction, being irrecoverable from the plaintiff because unauthorized, it was impossible for the defendant to retain the Government Paper which was deposited as security for the loan. Garth C. J., said:—"I confess if the case had depended upon the word "negotiate" in the power of attorney, I should have been disposed to take the same view as the learned Judge in the Court below. I see no reason why a Government note should not be "negotiated" like any other promissory note. ..... It was held in the *Bank of Bengal* v. *Fagan*, that a power to endorse a Government note of this kind authorized an endorsement of the instrument by way of pledge; and upon the same principal it seems to me that a power to negotiate such a note would authorize the negotiation by way of pledge .... But this case does not depend, in my opinion, upon the meaning of the word "negotiate" nor of any other word in the power of attorney. It involves a different and much broader question than that in the case of the *Bank of Bengal* v. *Fagan*. There the transaction in respect of which the pledge was made was perfectly honest and unimpeachable ..... But in this case the plaintiff's real object is to impeach the whole transaction between Messrs. Nicholl and Company and the defendant as a fraud upon himself for which from beginning to end Messrs Nicholls and

Company had no authority, and it is to be regretted that the plaintiff did not put his case upon this broad ground, and ask for relief as regards the promissory note, as well as the Government Paper ....." His Lordship therefore rested his judgment on the second ground relied on by White J. The case went up on appeal to the Privy Council;[1] Sir Richard Couch in delivering the judgment of the Judicial Committee, said:—"It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case (*Bank of Bengal* v. *Fagan*), as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively; Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively, but they do not see any reason why the rule laid down by Lord Bacon, *copulatio verborum indicat acceptationem in eodem sensu*, which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument ..... The power of attorney in the present case is not in the same form as that in the *Bank of Bengal* v. *Macleod*[2]; it does not contain in express words a power to "endorse," if it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to endorse the note, and so convert it into one payable to bearer, whenever he thought fit to do so for that purpose. But in this power the endorsement is not authorized in express words, but is authorized if it comes within the meaning of the words "And for the purposes aforesaid, to sign for me and in my name and on my behalf, any, and every contract or agreement, acceptance or other document." ..... The appellant's Counsel relied mainly upon the word "negotiate" and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson, Government promissory notes and other securities, not to borrow or lend money on them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note, it would probably be generally understood to mean, to sell or discount, and not to pledge it. Here it does not stand alone, and looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and for the same reason, "dispose of" cannot have that effect." A further examples of this rule as to the strict construction of formal documents is to be found in *In re Cunningham and Company, Simpson's*[3] *claim* previously referred to.

[1] I. L R., 10 Calc., 901, s. c. L. R., 9 App. Cas., 561.

[2] Moo, 1. A 1.

[3] L. R., 36 Ch D., 533 See also as to deeds *Doe* v. *Martin*, 4 East., (66).

Effect of words "pro proc".—Where the authority is created by a written instrument, or the agent signs an instrument "*pro proc*," the party dealing with the agent will be put upon enquiry, and if he fail to call for the power or fail to make due enquiry, the loss will fall upon him.[1]

Where the authority is of less formal character, how construed.—Where the authority is conferred in writing, but by some less formal document than a power of attorney, such an authority will be construed so as to include only such acts as are clearly within the scope of the particular matter to which the writing refers.[2] But in endeavouring to place a construction upon it, the intention of the parties will be sought for from the whole document.[3] Thus where upon a written request by an owner of a freehold property to an estate agent to procure a purchaser for it, and to advertise it at a certain price; it was held that the estate agent had no authority to enter into an open contract for sale, and semble that he had no authority to enter into any contract and sale.[4] As to the meaning to be put upon mercantile letter, and documents, see *Lucas* v. *Groning*,[5] *Chapman* v. *Walton*.[6]

Where the authority is oral or arises from implication, how construed.—Where the authority is conferred orally or arises from implication, it is equally to be construed as having reference only to such matters as are clearly within the scope of the authority conferred. Thus an authority granted to an agent to buy does not imply a power to sell.[7] Nor if a principal merely authorizes his agent to bid at an auction, will he be liable for an agreement entered into by the agent with a third party pledging him to pay to such party a certain sum in consideration that he should abstain from bidding.[8] This case is, however, a suppositious case only, put by their Lordships of the Privy Council, after having found that the facts finding such a case, were not warranted by the evidence and had not been stated in the pleadings. So where an agent of a wharfinger whose duty it was to give receipts for goods at the wharf, fraudulently gave receipts for goods which he had not received, the principal was held not to be responsible because such receipt was not within the scope of the agent's authority.[9]

[1] *Attwood* v *Munnings*, 7 B. & C., 278, (284).

[2] Story, para 69, *Kilgour* v *Finlyson*, 1 H. Bl, 155.

[3] *Concordia Chemische Fabrik auf Actien* v. *Squire*, 34 L. T N. S, 834. *Arlapa Nayak* v *Narsi Keshavji & Co*, 8 Bom H. C., (A. C. J.), 19.

[4] *Hamer* v. *Sharp*, L R., 19 Eq., 108.

[5] 7 *Taunt*, 164, (168)

[6] 10 *Bing*, 57

[7] *Goluck Chundher Chowdry* v. *Kanto Pershad Hazaree*, 15 W R, 317

[8] *Eshan Chunder Singh* v *Shama Churn Bhutto*, 6 W. R, (P C), 57.

[9] *Coleman* v *Riches*, 24 L J C P, 125

Where there is an ambiguity in the contract, how construed —A further rule in the construction of all written authorities is, that if the instrument which constitutes the authority is so worded as to be capable of two interpretations, then if the agent fairly and honestly assumes it to bear one of these interpretations, the principal will be bound[1]—And in such case it is not open to the principal to claim release from his contract on the ground that he intended it to bear the other interpretation, as the error will have arisen from his own indistinctness of expression, and he must therefore bear the loss.[1]—The reason given by Mr. Story for this rule, is, that where one of two innocent parties must suffer, he ought to suffer in preference who has misled the confidence of the other into an unwary act.[2] A proposition which has been said by Lindley L J., "to be common to the whole law of agency."[3] But nevertheless the most rational interpretation should always be put on the language of written instruments, and neither party will be allowed to escape from it by showing that some other construction might be put upon the words.[4] As where a commission was given to sell and transfer stock "when the funds should be at 85 per cent. or above that price," it was held that the agent was bound to sell when the funds reached 85; and could not defer selling till the funds reached a higher price.[5]

Exclusion of evidence in case of patent ambiguity; in case of latent ambiguity —As to how far and under what circumstances parol evidence may be given for the purpose of explaining ambiguities the rule is, that when the language used in a document is, on its face, ambiguous or defective, no evidence will be received to show its meaning or supply its defects.[6] Similarly when the language used is plain in itself, and applies accurately to existing facts, no evidence will be received to show that it was not meant to apply to such facts,[7] the reason being, that if such evidence were admitted, it would contradict the contract. On the other hand where the language used in a document is plain in itself, but is unmeaning with reference to existing facts, evidence will be received to show that such language was used in a peculiar sense;[8] and when the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more

[1] *Ireland* v. *Livingston*, L R, 5 H. L., 395. L. R, 2 Q B, 99. L. R, 5 Q B, 516. See also *Moore* v. *Morgue*, Cowp. 280, where no particular instructions were given.

[2] Story, para. 74.

[3] *Gordon* v. *James*, L. R, 30 Ch. D., (258).

[4] *Petgrave on Ag.*, 92. See *Lucas* v. *Groning*, 7 Taunt., 164.

[5] *Bertram* v. *Godfray*, 1 Knapp., 381.

[6] Act I of 1872, s. 93.

[7] Act I of 1872, s. 94.

[8] Act I of 1872, s. 95. See Field on Evid, notes on ss. 8 & 95, pp 92 & 475, (4th ed)

than one, of several persons or things, evidence may be given of facts showing which of those persons or things it was intended to apply to.[1] So also when the language used applies partly to one set of existing facts and partly to another, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.[2] And with reference to the use of technical words in any document, evidence may always be given to show the meaning of illegible or commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.[3]

[1] Act I of 1872, s. 96. [2] Act I of 1872, s. 97. [3] Act I of 1872, s. 98.

LECTURE VII.

RIGHTS OF THE AGENT AGAINST HIS PRINCIPAL.

PART I. RIGHT TO COMMISSION.

PART II. RIGHT TO A LIEN.

Part I.—Commission how fixed—By agreement or usage—If gratuitous agent no right—So if agreement repels the right—When due—When binding contract is made—Examples—The business must be effected through instrumentality of agent—Where agent has brought the parties together he may be entitled although completion of actual business not brought about by him—If contract completed practically constitutes contract, entitled—But transaction must be legal—Not payable where agent misconducts business—Where agent puts himself in a position in which he might be tempted to act corruptly—Where possible to sever contract may be entitled to partial commission—Revocation before completion of business—When entitled to compensation for revocation—Agent as consignee for sale when entitled—Revocation of authority where employment is qualified, effect of—Where business is prevented by principal—Commission payable subject to approval of title—Fulfilment of contract construed by usage of trade—Lien for commission.

Part II.—Lien, what it is—Particular or General—Right given by Statute—Right to general lien—This right not absolute—Banker's lien—Factors lien—Wharfinger's lien—Attorney's lien—Priority of attorney's lien—Policy broker's lien—Particular lien—Manner in which lien is acquired—Possession is necessary—As to what claims the right exists—No lien for officious services—It must be for a debt due from the person for whom agent acts—Exception—Under what circumstances right is divested—Not revived by resumption of possession—Exception—Right lost when debt on which it is claimed is satisfied—Not lost by goods being warehoused—Lost by misconduct—Whether lost by taking security—Not lost by set off—Where agent proves in insolvency—May be lost by act of party claiming it—Property detained as, lien cannot be sold—Maritime lien.

Right to Commission—The remuneration given to an agent is usually called "commission," the amount of which is either fixed by express agreement between the principal and the agent, or where no such agreement exists, is determined by the usage of trade in similar cases.[1] An express arrangement would, however, of course override a usage of trade.[2] Where there is no contract and no usage, it has been held that no commission is recoverable,[3] unless the work is completed.[4] The agent has a right to his commission,

[1] *Ecke* v. *Meyer*, 3 Camp., 412. *Cohen* v *Paget*, 4 Camp, 96. *Roberts* v. *Jackson*, 2 Stark., 225. *Chapman* v. *De Tastet*, 2 Stark., 204.

[2] *Bower* v. *Jones*, 8 Bing, 65.

[3] *Taylor* v. *Brewer*, 1 M & S., 290. *Hall* v *Guerney*, 2 C. & K, 644

[4] Ind. Contr Act, s. 219.

unless he is a mere gratuitous agent, or unless the understanding between the parties repels such a claim [1] Thus where a person performed work for a committee under a resolution entered into by them "that any service to be rendered by him should be taken into consideration and such remuneration be made as should be deemed right," it was held that no action would lie to recover a recompense for his work, the resolution importing that the committee were to judge whether any remuneration was due.[2] Commission usually consists of a percentage upon the actual amount of the value of the business done, or upon the value of the goods sold or bought, or upon the value of the freight of a ship chartered, and is usually paid by the seller of the goods or by the charterer of the ship.[3] Where there is a contract on the part of the agent to undertake to guarantee the fulfilment of the contract, or the payment of the goods sold, the commission is what is called "del credere," and for this undertaking the amount of commission is usually somewhat higher than the usual rate of commission given in other cases.

Commission when due.—In the absence of any special contract to the contrary, an agent's commission does not become due until the work on which he is employed is completed [4] The completion of the agent's work, generally speaking, takes place on his making a binding contract between the parties; thus in *Lockwood* v *Levick*[5] where a binding bargain had been procured by a commission agent, and accepted by the party employing him to procure orders, the agent was held entitled to his commission even though the principal through inability failed to supply the goods contracted for. So in *Buskin* v. *Ramkissen Seal*[6] the broker was held entitled to his commission after completing a contract, although the defendant refused to carry it out, but secretly sold to the intending purchaser behind the back of the broker. So in *Green* v. *Lucas*[7] when the defendant employed the plaintiff to *procure* a loan on certain leasehold property agreeing to pay commission upon the amount procured, the plaintiffs entered into negotiation with certain persons who agreed to advance the money subject to the title of the property proving satisfactory, it subsequently turned out that the lease prevented the proposing lenders from advancing the money. The plaintiffs then sued the defendant for commission, the Court held that he was entitled to his remuneration, having done all he was bound to do, on appeal the Lord Chancellor

[1] *Ecke* v. *Meyer*, 3 Camp, 412 *Roberts* v *Jackson*, 2 Stark., 225

[2] *Taylor* v. *Brewer*, 1 M. & S., 290.

[3] Levi's Merc. Law, p 165.

[4] Ind. Contr. Act, s 219. *Hammond* v. *Holliday*, 1 C. & P., 384 *Maester* v *Atkins*, 1 Marsh, 76; 5 Taunt, 381

[5] 8 C. B. N. S., 603.

[6] 23 W. R., 146.

[7] 31 L. T, 731. On appeal, 33 L. T., 584.

said, "It appears to me that the plaintiffs had done everything which agents in this kind of work are bound to do, and it would be forcing their liability, if they were to be held liable for what happened after. If the contract afterwards were to go off from the caprice of the lender, or from the infirmity of the title, it would be immaterial to the plaintiffs, and that appears to be the understanding of the persons themselves." Bramwell B construed the word "procure" in the contract, as to procure a lender and not to procure the money. So in *Fisher* v. *Drewett*,[1] where the defendant contracted with the plaintiff as follows: "In the event of your procuring me the sum of £2,000 or such other as I shall accept, I agree to pay you a commission of 2½ per cent. on any money received." The plaintiff procured a person willing to lend £1,625 if the defendant shewed a sufficient title to his security. The defendant accepted the offer, but failed to show a sufficient title The negotiations went off, and no money was in fact received by the defendant. The plaintiff claimed his commission. Bramwell L. J. said: "Now the current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to that commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced ..... Even if the rule that the agent is entitled to a commission when he has done his part, whatever may happen subsequently to prevent his work having effect, is confined to the case where the failure has arisen through the default of the employer, the defendant will not profit, for he has given no evidence of the default being in any one but himself."

The business must be effected through the instrumentality of the agent.—The business must, however, be effected through the instrumentality of the agent. Thus in an action to recover commission for the procuring of a loan, it is not enough to prove that the loan has indirectly, as a remote and casual consequence resulted from the intervention of the party who sues, but it must be proved that the loan was obtained by means of his agency or by means of some sub-agent of his, from the parties to whom he applied. And if all that appears is that the party to whom he introduced the subject, declining the proposal, mentioned it to a third party, who, not at his suggestion, but of his own mere motion knowing nothing of the plaintiff, negotiated the loan on his own account with the party sued, the commission is not due.[2] But where the agent has by acts or words brought the contracting parties together, he may be entitled to commission although the completion of the *actual business*, of the agency be not brought about by him; as in *Green* v *Bartlett*,[3] where an auc-

[1] 48 L. J. Ex., 32

[2] *Antrobus* v *Wickens*, 4 F. & F., 291.

[3] 14 C B N S, 681 See also *Benningfield* v. *Kynaston*, 82 L T. J., 81

tioneer and estate agent was employed to sell an estate under an agreement by which he was to receive a commission of 2½ per cent, "if the estate should be sold," and "in case the estate should not be sold" he was to be paid 25£ as compensation for his trouble. The estate was put up for sale but failed to sell; a person named Hyde who attended at the auction in consequence of the advertisments, but who did not bid, obtained from the auctioneer the name of the owner of the property, and after communicating with the owner, bought the property for £2,500. Previously to the sale being effected the owner, the defendant, had written to the plaintiff withdrawing his authority to sell. Erle C J., said:—"The question whether or not an agent is entitled to commission on a sale of property has repeatedly been litigated: and it has usually been decided that if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him. I think, the sale here having been brought about through the plaintiff's introduction, the plaintiff is entitled to the stipulated remuneration." As to the effect of this case upon a case of a house agent, see *Curtis* v. *Nixon*.[1] So also in *Bray* v. *Chandler*,[2] the plaintiff a surveyor and agent entered into an agreement with the defendant, upon, amongst other terms, that if the plaintiff should continue for 2½ years to discharge efficiently his duties as surveyor, he was to be allowed a commission, besides his salary, of £5 per cent. on the rent of any house let by him for the first year of the tenancy. The plaintiff was dismissed from the defendant's service for an alleged breach of one of the conditions of this agreement; the plaintiff sued for wrongful dismissal and for commission which he alleged he was entitled to for letting houses, the evidence on this point was, that one King was authorized to make contracts and to receive money on the part of the defendant, and that he had in fact let the houses and received the commission for so doing; but the plaintiff claimed to be entitled to this commission also under the agreement, inasmuch as the parties *had come to him in the first instance, and he had referred them to King* The Court found that he was entitled to his commission And in *Wilkinson* v. *Alston*[3] the defendant having ships for sale employed the plaintiff to obtain purchasers, agreeing to pay a commission if the plaintiff should be the means of introducing a purchaser. In February 1876, the plaintiff introduced a person who had been recommended to buy one of the plaintiff's ships by A, and the defendant's agreed that if this resulted in a sale, the plaintiff and A should share the commission. No sale resulted, but in March A mentioned the defendant's same vessel to B, who chanced to call upon him in reference to a ship of another owner. The plaintiff hearing of this, informed the defendant of B's call, and suggested his seeing B on the subject. The defendant did

[1] 24 L. T. N. S., 708 [2] 18 C. B., 718. [3] 48 L J. Q. B., 733.

nothing in the matter, and B had at that time no intention of purchasing the defendant's ship, and made no communication about it to any one. The defendant then told the plaintiff that it was no use doing anything until the ship returned home, and the plaintiff thenceforth took no steps to find a purchaser. A, however, in April, again reminded B of the vessel, but B took no notice of his letters, and neither the plaintiff, nor the defendant were aware of A's having written. In May B wrote as broker direct to the defendant in reference to the vessel, and after some negotiation, on the 13th June disclosed the name of the principal for whom he was acting, and the sale was effected. The plaintiff on hearing of this, claimed his commission on the ground that the purchaser had been introduced through the medium of his original negotiation with A. The jury found, that the plaintiff was authorized to find a buyer for the defendant's vessel, and second, that B, was induced to enter upon the negotiation for the purchase by the information he received from A, *held* that the plaintiff was entitled to his commission. In *Blackwell and Company* v *Jones*,[1] a charterparty was made between Haviside and Company the freighter and the defendants, the owners of a certain ship, and provided, amongst other matters, that the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship's business there inwards and outwards on the customary terms, not exceeding $2\frac{1}{2}$% on account of freight payable inwards, and 5% outwards The freighters nominated the plaintiffs to transact the business of the ship at Bombay a port of discharge, with the knowledge and consent of the master of the ship, and the plaintiffs accepted and acted under such nomination and collected the freight there payable on the outward voyage About a fortnight after the arrival of the ship in Bombay, the Captain informed the plaintiffs, that his ship had already been chartered in England, and showed them a charterparty, which provided that the ship should proceed to Bombay with cargo, and should then proceed to Akyab for orders to load either there or at Rangoon or Bassein, but to load at one of such ports only, and then to proceed to Cork or Falmouth for orders as to the port of discharge The plaintiffs claimed five per cent commission on the freight to be earned under this latter charterparty Green J, after determining that the plaintiffs had a right to sue notwithstanding that they were not named as parties to the contract, held that the plaintiffs were ready and willing to have procured homeward freight for the vessel, and that the plaintiffs were entitled to commission on the freight earned under the second charterparty So in *Bayley* v *Chadwick*,[2] which was an action for commission upon the sale of a ship The right to commission depended upon the following letter written by Chadwick to Bayley who was actioneer, "In case the ship is not sold by auction, she is forthwith to revert to the custody of the owners for private sale, but in

[1] 7 Bom H. C., (O. C. J.), 144. [2] 39 L T, 429.

case a subsequent sale be effected to any person or firm, introduced by you, or led to make such offer in consequence of your mention or publication for auction purposes, you are entitled to the same one per cent. commission on such sale." The ship was not sold by auction, but afterwards P. (having been present at a conversation which led him to believe that one Sugden would purchase the ship), wrote to the plaintiff "noting that he had the ship in his hands" to inquire the price, P then communicated with Sugden, who ultimately became the purchaser, but not through the agency of P; *held* that there was evidence to go to the jury that the sale was effected in consequence of the plaintiff's mention or publication within the agreement, and that the plaintiff was entitled to the commission. So in *Mansell* v. *Clements*,[1] where the plaintiff a house agent was instructed by the defendant to offer a leasehold house for sale, for which he was to receive a commission of $2\frac{1}{2}$ per cent. on the amount of praemium if he found a purchaser, but one guinea only for his trouble if the premises were sold "without his intervention." The particulars were entered in the plaintiff's books, and they gave a few cards to view. One Upton who had observed on passing that the house was to let, subsequently called at the plaintiff's office and obtained for him a card to view the premises on which was stated the praemium and other particulars. Upton went to the house a few days afterwards but considered the price asked too high. Subsequently Upton renewed his negotiation with a friend of the defendant's and ultimately became the purchaser of the house. The plaintiff sued to receive his commission on the purchase. At the trial the Judge asked Upton the following question:—"Would you, if you had not gone to the plaintiff's office and got the card, have purchased the house?" The answer was, "I should think not," held that independently of the answer given to this question (which was thought to be admissable), there was evidence to sustain a verdict for the plaintiff. But in *Tribe* v. *Taylor*,[2] the defendant wrote to the plaintiff offering a commission of 5% if the plaintiff would introduce a purchaser for certain premises and works, or introduce capital which the defendant should accept; the plaintiff succeeded in introducing one Wood to the defendant, who advanced him by way of loan a sum of £10,000, upon which the plaintiff received the agreed commission. Subsequently the defendant and Wood entered into an agreement for a partnership, on which occasion Wood made a further advance of £4,000 by way of capital to the business. The plaintiff claimed commission on the sum of £4,000, as being capital introduced by him and accepted by the defendant. It was admitted at the trial that the advance of £4,000 was not contemplated at the time of the advance of the £10,000, but that the £4,000 was advanced in consequence of the negotiation for a partnership. Lord Coleridge, held that the true effect of the admission was, that the

[1] L. R., 9 C. P., 139.

[2] L. R., 1 C. P. 505.

advance of the £4,000 was not the consequence directly or indirectly, of the negotiations referred to in the offer of the defendant, and therefore that the plaintiff was not entitled to commission on the £4,000. So in *Lumley* v. *Nicholson*,[1] where the plaintiff was instructed by the defendant to sell an estate which was divided into two lots, one of which was sold to one Armitage in October 1881, and for which the plaintiff received his commission. At this time Armitage was unwilling to purchase the other lot, though the plaintiff still hoped he would do so. In April 1882, the defendant's solicitor wrote to the plaintiff withdrawing the authority to sell that portion of the property. The plaintiff replied, saying, he had withdrawn the property from his books, but intimated that in the event of Armitage, then or at any future time becoming the purchaser, he would claim commission on the amount realized. To this, the defendant's solicitor declined to assent. In 1884 the defendant renewed negotiation with Armitage for the remainder of the property, and it was sold to the latter for £19,000. The plaintiff demanded commission and on refusal sued. At the trial, Armitage swore that until long after the revocation of the plaintiff's authority to sell, he had no intention to buy that portion of the property, *held* that the ultimate sale was not due to any introduction of the plaintiff, and that he could not therefore recover Here, however, the question of revocation arises, and it appears doubtful whether after revocation save in the instance of a sale of goods, the agent could recover more than *compensation* under ss. 205 and 206 of the Contract Act.

But commission can only be claimed by a house agent if the renting is the proximate consequence of the agent's act.—In *Curtis* v. *Nixon*,[2] the terms on which the plaintiff a house agent usually acted, as shown by his printed card, were, "Upon letting furnished houses on rent for any period, £5 per cent. on the first five hundred pounds, $2\frac{1}{2}$ per cent. from £500 to £1,000; 1 per cent on all above £1,000 per annum. Upon unfurnished houses £5 per cent. upon one year's rent, and upon the amount of any praemium": the defendant called on the plaintiff before employing him to let his house, and the plaintiff's manager showed him the card before mentioned, to which the defendant took no objection After advertising for some time, the plaintiff introduced one Mr. Fielden to the defendant, and held several interviews with the parties subsequent to the introduction. Subsequently the plaintiff received from the defendant a letter informing him that he had let his house to Fielden on the following terms:—"from 1st July 1870, three hundred guineas: or 350 guineas if taken on to 1st of May, Mr. Fielden to have the option of taking the house on for another year for 470 guineas." In the agreement subsequently drawn up, there was no mention of the option of taking the house on for another year at all. Before the

[1] W. N., (1886), 120.

[2] 24 L. T. N S., 706.

end of the nine months' tenancy, the defendant and Fielden, through the intervention of another house agent, and without any communication to the plaintiff agreed for another year's occupation from the 1st of April for four hundred and fifty guineas. The plaintiff was paid commission for the first nine months, and brought an action to recover his commission upon the rent of the following year; at the trial a custom was proved that a house agent received commission upon the rent of a furnished house from year to year so long as the tenant to whom be let occupied the house—*held* that a house agent could claim *commission only on rent obtained as a proximate consequence of his act*; that this is to be generally ascertained from the agreement he has himself prepared: that an option to take on a house, is not exercised if the tenancy be continued upon an agreement for a different rent obtained through the intervention of another house agent; that a trade custom under such circumstances was irrational and bad:—and that the plaintiff's suit must fail.

Effect of Green v. Bartlett.—The effect of *Green* v. *Bartlett*,[1] before cited, on a case of this kind is merely to make a landlord liable when no agreement is made by the agent, but when the landlord makes an agreement with a person whom the agent introduces for that purpose, the agreement then entered into is substituted for that which the agent would otherwise have made.[2] And where the agent has brought the contracting parties together it has been held in a special case, that if the contract completed by him *practically constitutes* the contract which he was authorized to bring about, he is entitled to commission. Thus in *Rimmer* v. *Knowles*,[3] the defendant instructed the plaintiff a surveyor to sell an estate and agreed to give him £50 if he obtained a purchaser at £2,000. The defendant subsequently raised his price to £3,000. The plaintiff *introduced* to the defendant a person who took a lease for 1,000 years at £150 a year, with the option of purchasing for £3,000 within twenty years. Cockburn C. J., said:—"I agree that if a creditor obtains a purchaser without anything being done by the agent whom he employed for that purpose, the agent cannot recover commission: but I proceed on this ground, that the facts of the case practically constituted a purchase." So also in *Harris* v. *Petherick*,[4] the defendants agreed with the plaintiff to remunerate him, in the event of their "taking into partnership" one Mowat, introduced by the plaintiff. The defendants afterwards entered into a written agreement with Mowat by which it was agreed that they should enter into partnership as from a specified future day, when a formal deed of partnership should be executed carrying out the terms of the agreement. The agreement recognized and adopted the agreement between the plaintiff and the defendants which was by letter. No partnership was, however, ever as a

[1] 14 C. B. N. S., 681.
[2] Per Willes J., *Curtis* v *Nixon*, 21 L. T. N. S., 708
[3] 30 L. T., 496.
[4] 39 L. T., 543.

matter of fact entered into between Mowat and the defendants, *held* that there was evidence of a "taking into partnership" within the terms of the agreement between the plaintiff and the defendants, so as to entitle the plaintiff to commission.

The transaction for which commission is payable must be legal.—It has been held that where the transaction is illegal the agent is entitled to no remuneration.[1] But this rule is said not to apply where the contract is not in itself illegal, although it may become so by the conduct of one of the parties.[2]

Commission not payable where agent misconducts the business.—If the agent has been guilty of misconduct in the business of the agency, he is not entitled to any remuneration in respect of that part of the business which he has misconducted.[3] Thus in *Hamond* v. *Haliday*[4] where the broker carried out his duties in such a manner that no benefit resulted from them, it was held that he was not entitled to his commission or even a compensation for his trouble. In *Hurst* v. *Holding*,[5] the plaintiff a broker purchased goods on account of the defendant at a month's credit and after paying certain duties thereon, forwarded them to the defendant consigned to his own order. The seller applied to the broker to stop the goods as he believed the defendant not to be in a position to pay for them. The broker thereupon gave instructions that the goods should not be delivered to the defendant except on payment of the price, and arranged matters so that the goods were not delivered to the defendant until the expiry of the month's credit, the defendant refused to take delivery, and the plaintiffs sold the goods to others; in a suit by the broker against the defendant to recover his commission and the duties paid by him, *held* that he was not entitled to recover either price, duties, or commission. In *Dalton* v. *Irvin*,[6] the defendant employed the plaintiff a ship-broker to obtain a charterparty for

[1] *Josephs* v. *Pebrer*, 3 B. & C, 639. *Cope* v. *Rowlands*, 2 M. & W., 157. *Loonie* v. *Oldfield*, 9 Q. B., 590. *Stackpole* v. *Earle*, 2 Wils. 133. See as to marriage brokers Tagore Lect. 1878, p. 93 and *Juggessur Chuckerbutty* v. *Panchchowri Chuckerbutty*, 14 W. R., 154. *Nobin Krishna Mookerjee* v. *Russick Lall Laha*, I. L. R., 10, Calc., 104. *Lallun Monee Dossee* v. *Nobin Mohun Singh*, 25 W. R. 32. *Waziri Mal* v. *Rullia Civil Ref.* 6 of 1888, N. W. P., unrep. where the marriage brokerage contract was held to be void.

[2] Evans on Pr. & Ag., 407. *Haines* v. *Busk*, 5 Taunt, 521, but see *Holland* v. *Hall*, 1 B. & A., 53.

[3] Ind. Contr. Act, s. 220, see *Gray* v. *Haig*, 20 Beav., 219, (235). *The Etna Insurance Co. re* Owens, Ir. Rep, 7 Eq., 235.

[4] 1 C. & P., 384. See also *Shaw* v. *Arden*, 9 Bing., 287, (290). *Hill* v. *Featherstonaugh*, 7 Bing., 569. *Turner* v. *Robinson*, 6 C & P., 16. *Denew* v. *Daverell*, 3 Camp., 451, and *White* v. *Lincoln Lady of*, 8 Ves., 363, (371). *Beaumont* v. *Boultbee*, 11 Ves., 358.

[5] 3 Taunt, 32.

[6] 4 C. & P., 289.

one of his vessels to Jamaica. When the charterparty was drawn up, it appeared that the plaintiff had inserted one guinea per ton as the rate of freight for logwood. The defendant on discovering this refused to sign the charterparty, and told the plaintiff that the freight for logwood ought to have been 5 guineas, and that unless it was altered to that sum, he would be off the bargain. The matter was not arranged and the bargain eventually went off. The plaintiff had had bills printed and had incurred other expense; and it appeared that the defendant had desired him to use all expedition in the matter. The plaintiff sued for his commission, held that he was not entitled to his commission. It does not, however, appear in the case as reported, that any stipulation as to the rate of freight was made previously to the broker obtaining the charter. So in *Gray* v. *Haig*,[1] where the defendant an agent for the sale of spirits on commission, had made profits by the sale of the plaintiff's goods, for which he had not given credit, and had also made profits by selling his own spirits mixed with those of his principal, and had destroyed his books of account pending litigation. The Court refused to allow, in the taking of accounts, commission which by the contract the agent would have been entitled to if his conduct had been proper. So in *Denew* v. *Daverell*,[2] the plaintiff an actioneer was employed to sell a leasehold house for the defendant; the plaintiff advertised the house and made out a particular of the conditions of sale which was submitted to the defendant, and of which he approved. This did not contain any proviso that the vendor was not to be called upon to show the title of his lessor. The lease was bought upon this particular by Lord Bolton who lodged a deposit, and called upon the auctioneer to show his lessor's title. This was not done. Lord Bolton therefore brought a suit to recover back his deposit; and succeeded in his action, and the deposit and costs were paid by the plaintiff, who then brought a suit against the defendant to recover the amount of damages and costs paid by him, and also $2\frac{1}{2}$ per cent. commission on the sale. The defence taken was, that the plaintiff had acted negligently and was not entitled to recover, there being a constant usage amongst auctioneers to insert a proviso in the particulars, that a vendor shall not be called upon to show the title of his landlord. Lord Ellenborough said:—"Where there is a special contract for a stipulated sum to be paid for the business done by the plaintiff, it has been usual to leave the defendant to his cross action for any negligence he complains of. But where the plaintiff proceeds, as here, upon a *quantum meruit*, I have no doubt that the just value of his services may be appreciated; and that if they are found to have been wholly abortive, he is entitled to no compensation. In the present case the plaintiff appears to have been guilty of gross negligence, and the defendant has suffered an injury in-

[1] 20 Beav., 219.

[2] 3 Camp., 451.

stead of deriving any benefit from employing him ..... I pay an auctioneer, as I do any other professional man, for the exercise of skill on my behalf, which I do not myself possess; and I have a right to the exercise of such skill as is ordinarily possessed by men of that profession or business. If from his ignorance or carelessness, he leads me into mischief, he cannot ask for recompense; although from a misplaced confidence, I followed his advice without remonstrance or suspicion."

Where the agent puts himself in a position in which he might be tempted to act corruptly.—And where the agent has not acted with actual misconduct, but had entered into a contract in which he might have been induced to act corruptly and the consideration for the contract itself was corrupt, he has been held to be entitled to no commission:—Thus in *Harrington* v. *Victoria Graving Dock Company*,[1] where the defendants contracted to pay the plaintiff a commission for superintending repairs to be executed by them on certain ships belonging to the Great Eastern Railway Company. And the plaintiff at the time of the contract was in a position of trust in relation to the Railway Company, having been employed by them as an engineer to advise them as to the repairs, and the contract between the defendants and plaintiff was made in consideration of a promise that the plaintiff would use his influence with the Railway Company to induce them to accept the defendant's tender for repairs of the ship. It was found that the contract, though calculated to bias the mind of the plaintiff, had not, in fact, done so, and that he had not in consequence thereof given less beneficial advice to the Company as to the defendant's tender than he would otherwise have done; held, that the plaintiff could not maintain an action for commission under the contract, on the ground that, even although the plaintiff had not been induced to act corruptly, the consideration for the contract was corrupt.

Where it is possible to sever the parts of the contract he may be entitled to partial commission.—If, however, that part of the business which the agent has misconducted, can be severed from the rest of the work done by him, then in such case he would be entitled to commission on so much of the business as has been properly carried out; thus where A employs B to recover a lac of rupees for C and to lay it out in good security. B recovers the Rs. 100,000 and lays out Rs. 90,000 on security which he ought to have known to be bad, whereby A looses Rs. 2,000. B will be entitled to commission for recovering the lac of rupees and for investing Rs. 90,000. But he is not entitled to any commission for investing Rs. 10,000 and he must make good the Rs. 2,000 to B.[2]

[1] L. R., 3 Q. B. D., 549. See also *Phosphate Sewage Co.* v. *Hartmont*, L. R., 5 Ch. D, 394, (457), where the trustees were made to refund commission.

[2] Ind. Contr. Act, s. 220, ill. (*a*).

Effect of revocation before completion of work or act.—Where the authority of the agent has been revoked before completion of the business of the agency, and there is a special contract between him and his principal as to commission, his right to commission depends on the terms of the contract. Thus in *Simpson* v. *Lamb*,[1] the plaintiffs who were clerical agents were employed by the defendant to sell an advowson upon the terms that they should be paid commission at the rate of 5 per cent. upon the purchase money *when the contract was completed.* And as the purchase money was likely to be large, the plaintiffs agreed to forego a claim of three guineas which they ordinarily made for entering such property on their books, and for the trouble of answering inquiries respecting it. The defendant subsequently revoked the authority to sell, and sold the property himself, held that the act of the defendant was not a wrongful revocation, that the plaintiffs were not entitled to recover anything, as they had not effected the sale, and there was no evidence of their having done more than was ordinarily covered by the charge of three guineas which they had agreed to forego. Jervis C. J., said:—"I think there can be no doubt that the authority was revocable: but that does not carry with it an absolute right on the part of the principal to revoke without reinstating the agent where his position has been altered; that will depend upon the terms of the original employment. I take it to be admitted that it is not competent to a principal to revoke the authority of an agent, without paying for labour and expense incurred by him in the course of the employment. The right of the agent to be re-imbursed depends upon the terms of the agreement. A general employment may carry wit it a power of revocation on payment only of a compensation for what may have been done under it; but there also may be a qualified employment under which no payment shall be demandable if countermanded In the present case I think the evidence shewed that the employment was of that qualified character." Under ss. 204 and 206 of the Contract, however, it appears that the agent would if no notice were given to him of the revocation be entitled to compensation. But where there is no such special contract, and the authority of the agent is revoked before completion of the business of the agency, the agent (save in the case of an agent for the sale of goods consigned) will be entitled to no commission,[2] but at most to a possible right to compensation.[3] Where, however, the agent is employed for the purpose of the sale of goods consigned to him, and his authority is revoked before the business of the agency is completed, he will be, although the whole of the goods consigned to him for sale may not have been sold, or

[1] *Simpson* v. *Lamb*, 17 C. B, 603; 25 L J C. P., 113; 2 Jur. N. S., 91. See also *Toppin* v. *Healey*, 11 W. R. (Eng), 466.

[2] Ind. Contr Act, s 219.

[3] Ind. Contr. Act, ss. 205, 206, 208.

although the sale may not be actually complete, entitled to receive commission proportionate to the extent of the services he has rendered and may enforce his lien on the proceeds of sale therefor.[1] If, however, the *whole sale is incomplete* he will be entitled to no commission, although he would still have a lien on the goods,[2] and might be entitled to compensation for the revocation if damaged thereby. In *Prickett* v. *Badger*,[3] the defendant employed the plaintiff to find a purchaser for some land at a commission of $1\frac{1}{2}\%$ on the purchase-money if a sale was effected. The plaintiff found a purchaser, but the defendant refused to complete the sale; and rescinded the authority. The Court held the plaintiff was entitled to recover reasonable remuneration, and Willes J., considered that the proper measure of damages would be the entire amount of the commission. The case, however, was one which turned upon the special contract, as will be seen from the fact that the learned Judge who tried the case directed the jury that the case depended upon the contract.

Where there is a special contract and the business is prevented or interrupted by the principal—The agent is not entitled to prospective commission where the business is prevented or interrupted by the principal. Thus where a person entered into an agreement with an Insurance Company to act as their agent for five years, and to transact no business except for the Company, in consideration of which he was to receive a fixed salary, and also a commission of 10% on all business transacted. And before five years had expired the Company was wound up, the agreement having been acted upon until the winding up, *held* that the agent was not entitled to prove against the Company for the loss of his commission during the remainder of the five years.[4] As to the effect on the contract of the withdrawal of an offer made by one of the contracting parties before ratification of the unauthorized acceptance of such offer by the agent of the other of such contracting parties see *Bolton Partners* v. *Lambert*.[5] In *Lara* v. *Hill*,[6] a clerical agent was employed to sell an advowson for B, upon the terms contained in a circular, in which it was stipulated that the commission should become payable upon the adjustment of terms between the contracting parties in every instance in which any information had been derived at, or any particulars given by, or any communication whatsoever had been made from the agent's office, however, and by whomsoever the negotiation might have been conducted, and notwithstanding the business

[1] Ind. Contr. Act, s. 219.

[2] Ind. Contr. Act, s 221.

[3] 1 C. B N S., 296. See also *Green* v. *Reed*, 3 F. & F , 226

[4] *In re English and Scottish Marine Insurance Co.*, L. R., 5 Ch., 737, but see *Inchbald* v. *Western Neilgerry Coffee Co.*, 17 C. B. N. S., 733.

[5] L R., 41 Ch. D., 295.

[6] 15 C. B. N. S., 45.

might have been subsequently taken off the agent's books, or the negotiation might have been concluded in consequence of communications previously made from other agencies, or on information otherwise derived, or the principals might have made themselves liable to pay commission to other agents; it being further stipulated that no accommodation that might be afforded should retard the payment of commission. A contract of sale having been arranged through these agents and duly executed, and the deposit paid on the 4th October 1862, the residue of the purchase money being payable on the 31st December 1862:—*held*, that the agent was entitled to his commission at all events on the 31st December, although the full purchase money, had not, for some unexplained reason, then been paid. In *Alder* v. *Boyle*,[1] the plaintiff an agent negotiated for the exchange of certain advowsons between B and C, and B contracted to pay the plaintiff £100 commission, "one-third down, and the remaining two-thirds when the contract of conveyance is drawn out." B's abstract of title was delivered to C, but nothing further was done in the matter, in consequence of C's declining to proceed with the exchange. In an action for the recovery of the balance of the commission; held that the agent could not recover, as the event had not happened for which the commission was to be paid. So in *Bull* v. *Price*,[2] the plaintiff a surveyor was retained by the defendant to negotiate with the Commissioners of Woods and Forests for the sale to them of certain premises belonging to the defendant, for which he was to receive a commission of 2 per cent. "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a jury was empannelled, by whom the value of the property was attested at £4,000; but in consequence of a defect in the defendant's title, the money was not paid to him, but was placed in the hands of the Accountant-General to await the adjustment of the difference. The surveyor was not previously aware of this defect; held that he was nevertheless not entitled to his commission until the money awarded was actually received by the defendant.

Commission payable, subject to approval of title by solicitor.—In *Clark* v. *Wood*[3] the plaintiff's claim was for commission on the sale of a piece of land, belonging to one Maxwell, by the defendant, one term of the contract between the plaintiff and the defendant being, that the defendant should be paid £100 commission subject to Maxwell's title being approved by the defendant's solicitor. The defendant broke off the sale alleging that he had been deceived as to a certain road important to the enjoyment of the property, which was represented on the

[1] 4 C. B., 635; 16 L. J. C. P., 232; 11 Jur., 591.
[2] 7 Bing, 237.
[3] L. R., 9 Q. B. D., 276.

plan as existing, but which had been stopped. The effect of the sudden termination of the transaction was that the abstract of title was never sent to the defendant nor approved by his solicitor. The defendant refused to pay the commission. North J., held that the defendant was entitled to judgment on the ground that the words in the contract "subject to the title being approved by my solicitor" imposed upon the plaintiff the obligation of tendering the title to the defendant, and its being approved by his solicitor, which had not been done. On appeal held that the plaintiff could not succeed without proving that the defendants solicitor had approved Maxwell's title, or else that such a title was submitted to him as it was unreasonable for him to disapprove.

Fulfilment of contract construed by an understanding of trade.—In *Warde* v. *Stuart*,[1] Warde was under an agreement with Stuart entitled to a commission of 6 per cent. on the net proceeds of dry merchantable palm oil received by Stuart, but was to be entitled to no commission on "any wet, dirty or unmerchantable palm oil," that might be received: held that Warde was entitled to no commission in respect of palm oil which was in the understanding of the trade "wet oil," though such wetness did not render the oil unmerchantable, but was compensated for by an allowance to the purchasers of from $1\frac{1}{2}$ to 2 per cent. on the price.

Lien for Commission.—And until payment of his remuneration is made or is accounted for, an agent has, in the absence of any contract to the contrary, a special lien on all moveable and immoveable property, papers and goods belonging to his principal, which may have come to his hands in respect of the business of the agency.[2]

PART II. THE AGENTS RIGHT TO LIEN.

Lien.—A further right of the agent as against the principal is a right to lien. A lien has been described by Lord Ellenborough to be the right in one man to retain that which is in his possession belonging to another until certain demands of the person who is so in possession are satisfied.[3] It is either particular or general.[4] A particular lien is the right to retain the thing itself in respect of which the claim arises;[5] and a general lien is a right to retain property not only for the demand specifically arising out of the property retained, but also for the general balance of accounts in respect of dealings of the like nature

[1] 1 C. B N. S., 88.

[2] Ind. Contr. Act, 221.

[3] *Hammonds* v. *Barclay*, 2 East., 235.

[4] *Houghton* v. *Mathews*, 3 B. & P., 494.

[5] *Rushforth* v. *Hadfield*, 7 East., 224, (229), Sel. N P, 1361

between the parties.[1] This latter lien when given by contract, requires to be strictly proved, as its tendency is to prefer one creditor above another.[2] It may here be noted that in India the right of lien is expressly given by Statute; the sections of the enactment relating thereto being founded and based on the rules of law applicable to the right of lien in force in England. Thus in England a particular lien exists either by the Common law, or by express contact;[3] whilst a general lien in the absence of a contract to the contrary is claimed as arising from dealings in a particular trade, or line of business in which the existence of a general lien has been judicially proved, and acknowledged; or upon express evidence being given that according to the established custom a general lien is claimed and allowed.[4] These rules of law, and the decisions thereon had been condensed and put into a statutory form in the Indian Contract Act; the English decision, therefore, so far as the origin of the right of lien is concerned, are of no practical utility to us in India; yet, they may, so far as the ultimate result of the particular cases is concerned, be very usefully referred to and used as throwing light on the subject of the right in this country.

The right to a general lien.—Bankers, factors, wharfingers, attorneys of a High Court, and policy brokers, in the absence of a contract to the contrary,[5] have a right to a general lien over any goods bailed to them; but *no other persons* have such a right, unless there is *an express contract* to that effect,[6] This latter paragraph appears to exclude a general lien being created on behalf of other persons such "by usage of trade,[7] as liens resulting from usage depend upon *implied contracts.* It is true that section one of the Contract Act expressly provides that nothing in the Act shall affect any usage or custom of trade not inconsistent with the provisions of the Act;[8] but do not the provisions of section 171 appear to be inconsistent with a right to a general lien by implication? The reference to, and use made of section one of the Contract Act in the case of *McCorkindale*[9] by Mr. Justice Wilson, cannot, I think, be applied for all purposes to section 171, as that section was there applied merely for the purpose of pointing out that the provisions of section 171 were not inconsistent

[1] Paley on Ag., 127.

[2] *Debnarain Bose* v. *Leisk*, 2 Hyde, 267, (271).

[3] Whitaker on Lien, 13.

[4] Evans on Principal and Agent, 428.

[5] *See* as to a special contract negativing general lien *Bock* v. *Gowrissen*, 7 Jur. N. S., 81. *How* v. *Kirchner*, 11 Moo. P. C. C., 21 (34).

[6] Ind. Contr. Act, s. 171. *In re The Bombay Saw Mills Co. Ld.*, I. L. R., 13 Bom, 314, (322).

[7] See however remarks of Scott J., *in re Bombay Saw Mills Co. Ld.*, I. L. R., 13 Bom., (321).

[8] See *Madhub Chunder Poramanick* v. *Rajcoomar Doss*, 14 B. L. R., 76.

[9] I. L. R., 6 Calc., 1.

with there being a custom for the discharge of a lien in the case of an attorney where the lien was created by Statute. And further it appears that there is authority for the proposition that no lien can arise by implication where the contract does not give one, at all events with respect to freight. In *Stevenson* v. *Blakelock*,[1] Lord Ellenborough says, "Where there is an express antecedent contract between the parties, a lien which grows out of an implied contract does not arise." So in *Blakey* v. *Dixon*,[2] it is said, "Where parties, instead of trusting to the general rule of law with respect to freight, have made a special contract for themselves for a payment which is not freight, it must depend upon the terms of that contract whether a lien does or does not exist, and that when the contract made gives no lien, the law will not imply one by implication.

The lien given by s. 171 of the Contract Act is not an absolute lien.—It was attempted in the case of *McCorkindale*,[3] to argue that the effect of s. 171 of the Contract Act was to give an absolute lien. There one McCorkindale employed the firm of Orr and Harris as his attorneys, up to the 23rd January 1880 the date of his death. On the 3rd February, Orr and Harris dissolved partnership, and the buisness was carried on under the name of Harris and Company; the firm retained possession of McCorkindale's papers; on 19th February the Administrator-General took out letters of administration to the estate of McCorkindale, and made repeated demands to the firm for delivery of these papers, agreeing to hold them subject to the firm's lien. Harris and Company refused to deliver up the papers without payment of their costs. An application was then made to the Court to compel them to deliver up the papers. It was contended that the section made no provision for the discharge of a lien; Mr. Justice Wilson as to this, said: "Mr. Apcar says, section 171 of the Contract Act gives the attorney an absolute lien, I do not think so, because the first section of the Act says, "Nothing herein contained shall affect any usuage or custom of trade." It seems to me that no part of the English law is inconsistent with s. 171 of the Contract Act, and therefore, this case must be governed by the English authorities. The clear principle on which this case rests is, that while the relation of attorney and client exists, the client may continue to employ the attorney or change him. When he claims to do that, the attorney being willing to act, he cannot ask the attorney to give up the papers without first satisfying the lien. The attorney has his option, he may if he chooses go on acting for his client, or if he chooses, to cease to act, then he must give up the papers. There is no doubt how this case would have been decided had McCorkindale been still alive. It is clear that the attorneys would have by their own act put it out of their power to act for him." His Lordship then on the au-

[1] 1 M. & S., 543.

[2] 2 B & P., 321.

[3] *In the matter of McCorkindale*, I. L R., 6 Calc., 1.

thority of *In re Moss*,[1] held that the death of McCorkindale did not alter the case, and that the Administrator was entitled to the papers. The right to a general lien may also as has been mentioned, be created by express contract;[2] and it seems it may also in the same way be modified by extending, confining, or even by excluding its ordinary operation.[3] And even without express words it may be excluded, by the terms of the contract being inconsistent with the existence of such right.[4] So also if the contract stipulates that the payment for the work done is to be paid for in a particular manner or out of a particular fund, the right of lien may be lost in consequence of the agreement being inconsistent with it,[5] but it will not be so if the terms of the special contract are not inconsistent with the right.[6] There also appears to be no reason why a particular lien should not also be created by contract, although such contract is of course unnecessary, all classes of agents possessing by Statute a right to a particular lien, and the cases above last cited show, (they being for the most part cases in which the lien was particular) that such a lien may by contract be modified by extending confining, and even excluding the right to its ordinary operation.

Banker's Lien.—A banker has a general lien for the balance of his account,[7] and also a particular lien on monies belonging to his principal in his hands for his commission and advances.[8] But not if there is an express contract to the contrary or circumstances pointing to the fact that such lien is excluded.[9] But his lien does not arise on securities deposited with him for a special purpose, as where exchequer bills are placed in his hands to get interest, or to get them exchanged for new bills.[10] And he has no lien on muniments casually left with him after he has refused to advance money on them as a security.[11] Nor

[1] L R, 2 Eq., 345.

[2] Ind Contr. Act, s. 171. *See in re Llangennech Coal Co*, W. N., (1887), 22, and *Miles* v. *New Zealand Alford Estate Co.*, L. R, 32 Ch. D., 266. *Bradford Banking Co.* v. *Briggs*, L. R., 12 App. Cas., 29, by articles of association.

[3] *Owenson* v. *Morse*, 7 T. R., 64.

[4] *Jackson* v. *Cummings*, 5 M. & W., 342. *Forth* v. *Simpson*, 13 Q. B., 380.

[5] *Pinnock* v. *Harrison*, 3 M. & W., 532.

[6] *Chase* v. *Westmore*, 5 M. & S, 180.

[7] Ind. Contr. Act, s. 171. *Davis* v. *Bourner*, 5 T. R., 488. *Jordaine* v. *Lefevre*, 1 Esp. 66. *Brandao* v. *Barnett*, 12 Cl & F., 787, (806).

[8] Ind. Contr. Act, s. 221. *In re European Bank*, L. R., 8 Ch., 41. *Leese* v. *Martin*, L. R., 17 Eq., 224.

[9] *London Chartered Bank of Australia* v. *White*, L. R., 4 App. Cas., 413. Ind. Contr. Act, ss. 171, 221.

[10] *Brandao* v. *Barnett*, 12 Cl. & F., 787; 3 C. B., 519. *Macnee* v. *Gorst*, L. R., 4 Eq., 315, (325).

[11] *Lucas* v. *Dorrien*, 7 Taunt, 278.

can he claim a general lien arising out of a transaction in which the goods or securities are by agreement held for a particular purpose or under special conditions inconsistent with the claim of a general lien.[1] Nor will he have a lien for a larger amount than the security given for a special advance, although more may be owing.[2] Nor has he a lien on the deposit of a partner on his separate account, for a balance due to the bank from the firm.[3] His lien will not be affected and he can safely advance money upon security of stock or shares deposited with him by any one, as long as he has no notice or reasonable cause to believe that the stock or shares belong to another; but where he has such notice or reasonable cause to believe, his lien on the deposit is only good as a security for the general balance due to him at the period of notice or constructive notice.[4] And although deeds be deposited with a banker by way of equitable mortgage which deeds apply to various properties, if it be apparent on the memorandum of deposit and dealing of the parties, that a portion only of those properties was intended as the security, his lien extends no further than that portion.[5] And he has no lien on bills paid in to the credit of a customer for the purpose of collection, which bills are not then due, unless he discount or make advances thereon.[6] As to the lien of an army agent acting as a banker. See *Roxburghe* v. *Cox*.[7]

Factor's Lien.—A factor has a lien on his principal's goods for the general balance due to him,[8] he has also a right to retain, until his commission and advances have been paid, any particular goods, papers or property in respect of which his services have been employed.[9] He has a lien on the price of goods of the principal in the hands of a purchaser, even though he has given up possession to the latter, where he is acting on a *del credere commission*, and this is because he has a power of suing and of granting a discharge for the goods;[10] but otherwise where he has no such special claim on the goods;[11] and the principal's bankruptcy will not affect his lien, even though the factor was aware when making advances that his

[1] *Book* v *Gorrissen*, 2 De G F. & J, 434, (447). *In re Bowes, Strathmore* v. *Vane*, L. R. 33 Ch. D., 586. *Gentle* v. *Bank of Hindoostan Ld.*, 1 Ind. Jur. N. S., 245.

[2] *Vanderzee* v *Willis*, 3 Bro C. C, 21.

[3] *Watts* v. *Christie*, 11 Beav., 546.

[4] *Locke* v. *Prescott*, 32 Beav., 261

[5] *Wylde* v. *Radford*, 12 W. R. (Eng.), 38.

[6] *Giles* v. *Perkins*, 9 East, 12.

[7] L. R., 17 Ch. D., (523).

[8] Ind. Contr. Act, s. 171 *Godin* v. *London Assurance Co.*, 1 W. Bl., 104. *Brandao* v. *Barnett*, 3 C. B., 519. *Kruger* v. *Wilcox*, Ambl, 252.

[9] Ind. Contr. Act, s. 221. *Brandao* v. *Barnett*, 3 C. B, 519.

[10] *Drinkwater* v. *Goodwin*, Cowp., 251.

[11] *Garrati* v. *Cullum*, Bull. N. P., 42. Sel. N. P., 813.

principal was in insolvent circumstances.[1] But he can claim no lien on goods coming to his hands after the commission of an act of bankruptcy by the consignor, although advances have been made by him.[2] And where he agrees by special contract for a particular mode of payment he does away with his right to lien.[3] He will have no lien for a debt due from a person for whom he is selling goods. when he is aware of a special arrangement between his principal and the vendee under which the goods were to be taken in part satisfaction of a demand which the latter had against the former.[4] Nor has he any lien on property belonging to his principal for advances or debts which accrued before his character of factor commenced;[5] nor will his general lien attach till the goods of his principal come into his actual possession,[6] and this though he may have accepted bills upon the strength of a consignment made to him. Nor will an agent lose his lien as factor by reason of his acting under special instructions from the principal to sell goods, with the possession of which he has been entrusted, at a particular time and in the principal's name;[7] and *in re Hermann Loog Limited*,[8] it has been held that a salaried agent entrusted by a Company then winding up with goods for sale on commission besides his salary, is entitled to a lien for bills accepted.

Wharfinger's Lien.—A wharfinger has not only a lien on goods deposited at his warf for the money due for the wharfage of those particular goods,[9] but has also a right to detain any goods, papers and other property, belonging to his principal in his hands for the balance of his general account[10] and this though part of his claim is barred.[11] But he has no right of lien upon goods which are not actually landed upon his wharf, although a vessel in which the goods are, be fastened to the wharf and be unloaded.[12] The mere fact that a *manufacturer* has a wharf upon which he receives goods brought to him by his customers, does not make him a *wharfinger*, giving him the right to claim a lien for the general balance of his account.[13] Nor will he be deprived of his lien because the owner of the goods deposited with him has acted fraudulently

[1] *Foxcroft* v. *Devonshire*, 2 Burr., 931.

[2] *Copland* v. *Stein*, 8 T. R, 199. *Zinck* v *Walker*, 2 Wm. Bl., 1154.

[3] *Cowell* v. *Simpson*, 16 Ves., 280. *Walker* v. *Birch*, 6 T. R., 258.

[4] *Weymouth* v. *Boyer*, 1 Ves, 416.

[5] *Houghton* v. *Mathews*, 3 B. & P., 485.

[6] *Kinloch* v. *Craig*, 3 T. R., 119, 783. See *Man* v. *Shiffner*, 2 East., 523.

[7] *Stevens* v. *Biller*, L. R, 25 Ch. D., 31.

[8] *W. N.*, (1887), 180; *on appeal*, 191.

[9] Ind. Contr. Act, 221. *Naylor* v. *Mangles*, 1 Esp., 109.

[10] Ind. Contr. Act, 171 *Naylor* v. *Mangels*, 1 Esp., 109.

[11] *Spears* v. *Hartly*, 3 Esp. 81. *Richardson* v. *Goss*, 3 B. & P., 124.

[12] *Syeds* v. *Hays*, 4 T. R., 260.

[13] *Miller* v. *Nasmyth's Patent Press Co.*, I. L. R., 8 Calc., 312.

towards third persons by infringing a trade-mark, and his lien in such case will have priority over the owner's lien for costs of the action for infringment, and he will be entitled to his costs when made a party to such suit, which should not be made dependent on the way his Counsel argue the case on his behalf.[1]

Attornies' Lien of.—An attorney of a High Court, in the absence of a contract to the contrary, has a lien for his general balance of account on all papers and documents belonging to his client, which come to his hands in the course of his professional employment.[2] He has two kinds of lien for his costs, one on the fund recovered, and the other on the papers in his hands; his lien on the fund recovered is a particular lien only, and does not extend to any general balance due to him for professional services in other cases.[3] His lien is, however, only commensurate with the right which his client has to the papers;[4] and if his client is bound to produce them to third parties so also is the attorney.[5] He has no right to detain papers against a remainderman, when they have come to his hands through the tenant for life.[6] He has a lien for his costs on a judgment recovered by his client;[7] but he does not, acquire a lien for his costs upon the documents of his client which came into his possession, not in the character of solicitor, but as mortgagee of his client's estate; nor will he acquire a lien for costs due solely to himself, upon documents which came into the joint possession of his partner or partners, but he does not lose his lien for such costs upon documents, which, having come into his own possession, are afterwards, continued in the possession of his partner or partners.[8] His lien on the fruits of a compromise, in a suit in which he is acting, is not extinguished by his taking securities which turn out to be worthless.[9] The Court, however, will not interfere, to set aside an arrangement come to between a plaintiff and a defendant in a suit, in favor of an attorney, except where there has been fraud or collusion between the parties.[10] But where a case has been compromised between a plaintiff and a defendant personally before delivery or payment of the attorney's bill, the defendant will not be liable to refund to the

[1] *Moet* v. *Pickering*, L. R., 8 Ch. D., 372 overruling L. R., 6 Ch. D., 770.

[2] Ind. Contr. Act, s 171 *Stevenson* v *Blakelock*, 1 M. & S., 535. *Ex-parte Nisbett*, 2 Sch. & Lef., 299.

[3] Ind. Contr Act, ss. 171, 221. *Pope* v *Armstrong*, 3 Sm. & Marsh., 244, cited in 2 *Kent's Comm.*, 853 *Devkabai* v. *Jefferson*, I. L. R., 10 Bom., 253.

[4] *Wakefield* v. *Newbon*, 6 Q. B., 276. *Hollis* v. *Claridge*, 4 Taunt., 807. *Pelly* v. *Wathen*, 7 Hare, 351.

[5] *Furlong* v *Howard*, 2 Sch. & Lef., 115.

[6] *Ex-parte Nisbett*, 2 Sch., & Lef., 279. *Davies* v. *Vernon*, 6 Q. B., 443., (447).

[7] *Mitchell* v. *Oldfield*, 4 T. R., 123.

[8] *Pelly* v. *Wathen*, 7 Hare 351.

[9] *Davies* v. *Lowndes*, 3 C. B., 808, 829.

[10] *Slater* v. *Mayor of Sunderland*, 33 L. J. Q. B., 37. *Brunsden* v. *Allard*, 2 El. & El., 19.

plaintiff's attorney, unless the attorney has given notice to the defendant before the compromise, not to settle with the plaintiff until payment of his bill.[1] But where after notice of his lien from the plaintiff's attorney to the defendant's attorney, the latter pays over the debt and costs to the plaintiff himself, the plaintiff's attorney can insist on the defendant's attorney paying to him the amount of his lien on such debt and costs.[2] But see the cases of *ex-parte Morrison*[3] and *The Hope*[4] which are authorities that the compromise would stand, if the money is paid over before notice; but which decisions are said in *Ross* v. *Buxton*,[5] not to conflict with the proposition that where a valid compromise has been entered into under which a sum of money, the fruit of the action, is coming to the plaintiff, the defendant or his solicitor, is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien, to pay that sum over to the plaintiff in disregard of the notice. Where the plaintiff has settled with the defendant, the result of the litigation being doubtful, and he has done so without fraud, the plaintiff's attorney is not entitled to be recouped by the defendant.[6] He has also a lien on sums awarded to his client on an arbitration,[7] so also on monies levied in execution on behalf of his client.[8] An attorney who discharges himself cannot set up a lien for costs as a reason for not delivering up papers necessary to enable his client to proceed with pending matters in litigation to which they relate,[9] yet when he is discharged by the client he may set up his lien, and will not be compelled to deliver up to the client the papers on which he claims his lien.[10] And where an attorney refuses to go on with a suit unless provided with funds, and the client appoints a fresh attorney, this will amount to a discharge by the attorney, and he will be bound to deliver over to the new attorney the papers relating to the suit, on their undertaking to hold them without prejudice to his lien.[11] But an attorney for trustees of an estate which is under the administration of the Court, have not,

[1] *Welsh* v. *Hole*, 1 Doug, 226, 237. *Omerod* v. *Tate*, 1 East., 464. *Vaughan* v. *Davies*, 2 H. Bl, 440, a case of set off. *Read* v. *Dupper*, 6 T. R., 561.

[2] *Welsh* v *Hole*, 1 Doug, 226, 237. *Omerod* v. *Tate*, 1 East, 464. *Ross* v. *Buxton*, L. R, 42 Ch. D., 190. *Read* v. *Dapper*, 6 T. R, 361.

[3] L. R., 4 Q B, 153.

[4] L. R., 8 P. D., 144.

[5] L R., 42 Ch. D, 190.

[6] *In re Sullivan* v. *Pearson, ex-parte Morrison*, L R., 4 Q. B., 153. *Ramnath Dutt* v. *Matungynee Dossee*, 12 B. L. R., 110.

[7] *Omerod* v. *Tate*, 1 East, 464.

[8] *Griffin* v. *Eyles*, 1 H. Bl, 122.

[9] *In re Faithful, Brighton and S. C. Ry. Co.*, L. R., 6 Eq., 325. *In re McCorkindale* I. L. R., 6 Calc, 1.

[10] *In re Faithful, Brighton and S. C. Ry. Co.*, L. R, 6 Eq., 325.

[11] *Robins* v. *Goldingham*, L. R., 13 Eq., 440.

after their discharge, such a lien for costs and money advanced in the suit as will enable them to refuse production of documents which are required by a Receiver appointed for the management of the estate.[1] It appears doubtful whether his lien for his costs on a fund in Court is general, or is confined to the costs of the particular suit;[2] His lien does not extend to debts which are not due to him in his professional character.[3] Nor has the solicitor for the parties to an administration suit, on a change of attornies, any right to assert a lien for costs on papers in his possession in such way as to embarrass the proceedings in the action, but on the contrary he must produce them when they are required for the carrying on of the suit.[5] And where in a suit by a debenture holder against a Company, the plaintiff in the course of the proceedings became bankrupt, and another debenture holder was substituted for him as plaintiff, and an order was made directing the solicitor of the first plaintiff to deliver over all papers, etc., to the solicitor of the substituted plaintiff, the solicitor of the first plaintiff will have no lien on the documents entitling him to priority in respect of his costs.[4] Where an intending mortgagor instructed a solicitor to prepare a mortgage, and left the title deeds with him for that purpose; who after preparation of the mortgage, held the mortgage as solicitor of the mortgagee; and the mortgagor filed a liquidation petition, and the trustee, for whom the same solicitor was acting, sold the equity of redemption, and the purchase-money came to the hands of the solicitor, he was held to have a lien on the deed against the mortgagor, and was entitled to retain out of the purchase-money, the amount of costs due to him from the mortgagor.[5] But where certain mortgagees deposited with a solicitor for safe custody their mortgage deeds; and the mortgagor afterwards instructed the same solicitor to sell the property, and he employed an auctioneer for that purpose, the solicitor preparing the particulars and conditions of sale; the sale turned out abortive; and subsequently the mortgagor filed a liquidation petition, and the trustee contracted to sell the mortgaged property, it was held that the solicitor had no lien on the deeds as against the trustee in respect of his costs of the abortive sale.[6] But a solicitor acting for both mortgagee and mortgagor in the preparation of a mortgage, thereby loses his lien on the title deeds, in his posses-

[1] *Belaney* v. *Ffrench*, L. R., 8 Ch. D., 918. But see *in re Capital Fire Insurance Association*, L. R, 24 Ch. D., 408.

[2] *Wurrall* v. *Johnson*, 2 J. & W., 214.

[3] *In re Boughton, Boughton* v. *Boughton*, L. R, 23 Ch. D, 169. *In re Gallard*, L. R., 31 Ch, D., 306

[4] *Batten* v *Wedgwood Coal and Iron Company*, L. R., 28 Ch. D., 317. But see *Hutchinson* v. *Norwood*, W. N., (1886), 112.

[5] *In re Messenger, Ex-parte Calvert*, L. R, 3 Ch. D., 317

[6] *Ex-parte Fuller. In re Long*, L R, 16 Ch D, 617

sion for costs due to him from the mortgagor; unless such lien is expressly reserved, even though the mortgagee may have known that the solicitor had such a lien as against the mortgagor.[1] And where a client mortgaged certain property which was at the time subject to a first mortgage to his solicitor, who prepared the mortgage deed to himself; and subsequently the mortgagor made a third mortgage to another person, the solicitor was held to have no lien on the mortgage deed for the costs of the preparation of the mortgage deed.[2] He has a right to retain as his own property letters addressed to him by his client, and copies in his letter book of his own letters to his client, after the client has transferred the business to which such letters relate to other attorneies.[3] But he is not entitled to refuse to produce documents belonging to a bankrupt for the examination of the trustee in bankruptcy, on the ground of his lien on such documents in respect of professional services before the bankruptcy.[4] Under the Companies Act, s. 115 (Indian Comp. Act, s. 162) the solicitor of a Company may be compelled by the official liquidator in the winding up of the Company to produce documents relating to the Company, without prejudice to his lien.[5] Where a solicitor was clerk to a local board, with a salary, and transacted both the legal and ordinary business of the board, whatever may be his claim against the board for professional services, he may be compelled, being a servant of the board, to produce for the purpose of a suit by the board all papers and documents belonging to the board; but he will not be so compelled, as such an order might prejudice his lien, before the trial, without a payment into Court is made of a sum sufficient to meet his claim.[6] He has as town clerk a lien on papers of the Corporation with respect to which he has done work as attorney, but not on such as he holds merely as town clerk.[7]

Meaning of expression "lien on a judgment."—In an action brought on an Irish judgment to which the defendant pleaded a set off of a judgment recovered by him against the plaintiff, and the plaintiff alleged that he was suing as trustee for his attorney who had incurred costs in obtaining the judgment and had a lien upon it, the Court considered that the attorney did not stand in the relation of trustee to a cestui que trust, and that the

[1] *In re Snell*, L. R., 6 Ch. D., 105. *In re Mason and Taylor*, L R., 10 Ch. D., 729 But see *Macfarlen* v *Lister*, L. R, 37 Ch. D., 88 in which *in re Snell*, was distinguished.

[2] *Sheffield* v *Eden*, L. R., 10 Ch. D., 291.

[3] *In re Wheatcroft*, L R., 6 Ch. D, 97.

[4] *In re Toleman and England Ex-parte Bramble*, L. R, 13 Ch. D., 885.

[5] *In re South Essex Estuary and Reclamation Co., Ex-parte Paine and Layton*, L R, 4 Ch, 215. See also *In re Capital Fire Insurance Association*, L. R., 24 Ch D, 408.

[6] *Newington Local Board* v *Eldridge*, L R, 12 Ch D, 349.

[7] *The King* v. *Stanley*, 5 A & E., 423

only question upon it was whether the defendant had a right to set off his judgment against the plaintiff; as to this Cockburn, C. J., said:—"The attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf, as trustee for him. In truth ..... there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in Chit. Arch. Pr. pp. 139, 140, (12 Ed.), that although we talk of an attorney having a lien upon a judgment it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs. But this is always on notice to the debtor Judgment for the defendant.[1]

Lien in cases of winding up—The solicitor to an official liquidator has no lien for his costs on the file of the proceedings in the winding up and the documents relating thereto.[2] And where the defendant, a solicitor was employed by one O'Hagan (who was a director and a promoter of a limited Company then in liquidation,) with the privity of three other persons, the holders as nominees of O'Hagan of certain shares in the Company, to take proceedings in connection with the winding up of the Company. And O'Hagan deposited with the defendant the certificates of the shares for the purpose of enabling him to carry out his instructions, and the defendant received from the liquidator of the Company certain cheques in respect of the shares standing in the names of those persons. And in the meantime O'Hagan transferred to the plaintiffs his interest in the shares, with notice of the lien and charge of the defendant thereon for his costs; and the defendant, acting upon the retainer of the plaintiffs, continued the proceedings, and ultimately received from the liquidator several cheques payable to O'Hagan and the other three persons respectively, it was held, in an action to recover those cheques, that the defendant was entitled, as against the plaintiffs, to a lien upon them for his costs of all the proceedings against the Company, in respect of the shares.[3]

Priority of lien.—An attorney is entitled to enforce his lien on a sum in Court as against an attaching creditor for all costs incurred up to the date of attachment, and after that date, the attaching creditor can claim payment before the attorney's claim is further satisfied.[4] So he will have priority over claims for necessaries supplied after the institution of the action, but not over claims for necessaries supplied previously.[5]

Lien of policy brokers.—A policy broker has a general lien on goods in his

[1] *Mercer* v. *Graves*, L L, 7 Q B, 499.

[2] *In re Union Cement and Brick Co., Ex-parte Pulbrook*, L R, 4 Ch., 627.

[3] *General Share Trust Co* v. *Chapman* L R, 1 Ch D, 771.

[4] *Supramyan Setty* v. *Harry Frioo Mug*, I. L. R., 14 Calc., 374.

[5] *The Heinrich*, 41 L J Ad, 68 Newson's Dig, 150

hands belonging to his principal the assured, and also on the policy;[1] he also may retain money received by him on such policy or goods for advances, commission and his services rendered,[2] and in the absence of a contract to the contrary, may retain goods, paper and other property of the principal received by him until the amount due to him is paid.[3] But if the broker be employed to insure by an agent and he is aware of this, he will have no general lien, but only a lien upon the policy for his commission and the amount of the praemium;[4] but if he be not aware of the existence of any other principal but the agent or person employing him, he will have a lien on the policy for the general balance of his account.[5] The only question as to the retention of his lien on the general balance in his hands, is "whether he knew or had reason to believe that the person by whom he was employed was only an agent, and the party who seeks to deprive him of his lien must make out the affirmative."[6] If, however, the broker wrongfully dispose of the policy, or even part with the possession of it to his employer, he will lose his lien; it will, however, revive if he obtain possession of the policy again.[7] And where a person acts for his principal both as policy broker and factor, and in the former capacity effects policies and pays the praemia thereon, and in the latter capacity has in his hands goods belonging to his principal for the purpose of sale, and on which he has made advances, he will be entitled to retain the sum received for a loss on any such policies, as well as in liquidation of his advances on the goods, as for the balance due to him on account of praemia.[8] But where a broker employs a factor to insure, he has only a lien on the policy to the extent of the factor's balance against his principal.[9] The policy brokers lien may, however, be superseded by special arrangement or contract,[10] or by his particular mode of dealing with the parties for whom he has effected policies. But where he has merely agreed to state monthly accounts and to receive monthly payments made to him, his general right of lien is not superseded in any way by this special arrangement. And this is so, though he has effected the policies through an intermediary,

[1] Ind. Contr Act, s. 171. *Whitehead* v *Vaughan*, Cooke's Bank-Law, 6th ed 442.

[2] Ind. Contr. Act, s. 217. *Whitehead* v. *Vaughan*, Cooke's Bank Law, 442.

[3] Ind Contr Act, s. 221.

[4] *Maanss* v. *Henderson*, 1 East, 335. *Fisher* v. *Smith*, 34 L. T, 912. See however Phillips on Insurance, Vol. II, s. 1909.

[5] *Mann* v. *Forrester*, 4 Camp., 60. *Sweeting* v. *Pearce*, 7 C. B. N. S., 449. *Fisher* v. *Smith*, 34 L. T, 912.

[6] *Westwood* v. *Bell*, per Gibbs C. J., 4 Camp., (353).

[7] *Whitehead* v. *Vaugham*, Cooke's Bank. Law, 442. *Westwood* v. *Bell*, 4 Camp., 349. *Levy* v. *Barnard*, 2 J. B., Moore, 34; 8 Taunt., 149. Newson on Shipping, 211

[8] *Olive* v *Smith*, 5 Taunt., 56.

[9] *Mann* v. *Schiffner*, 2 East, (529).

[10] Ind Contr Act, s 171

whom he knew to be an intermediary and not the principal, and who has received payment from the principal, but who has not paid the broker.[1]

Particular lien.—The Contract Act gives to all classes of agents, in the absence of a contract to the contrary, a particular lien for their commission, disbursements, and services, on all property of their principal which may come to their hands in the course of the business the subject matter of the agency;[2] and for advances and expenses properly made and incurred by them, and on moneys received on account of their principal.[3] Similarly the finder of goods has a particular lien on such goods until he receives compensation for his trouble and expense in endeavouring to find out the owner.[4] So an agent for the sale of goods may enforce a lien for expenses for advance or commission on the goods consigned to him, even though the whole of the goods consigned to him may not have been sold, or although the sale may not be complete.[5] A particular lien in the absence of a contract to the contrary also is given to a bailee for services involving the exercise of skill and labour expended by him on the goods bailed in accordance with the purpose of the particular bailment.[6] So where the official assignee claimed certain unbaled jute which had been delivered (at various times but under one contract) to a Pressing Company to be baled previously to the insolvency, and the Pressing Company being still then in possession of some of the unbaled jute which had been delivered to them under the contract, refused to deliver it up, claiming a particular lien on it on the ground that these particular goods formed part of a larger quantity which had been pressed by them, and that they had therefore a particular lien over the goods in respect of the balance due to them for the entire quantity pressed under the contract. Wilson J held that the defendant's contention was valid, on the authority of *Chase* v. *Westmore*,[7] which showed where a person does work under an entire contract, with reference to goods delivered at different times, such as to establish a lien, he is entitled to that lien on all goods dealt with under the contract.[8] The principle on which such a lien is founded is that the bailee has expended his labour and skill in the improvement of the chattel delivered to him, and he therefore has a lien for his charges in

[1] *Fisher* v. *Smith*, L R, 4 App. Cas, 1. 34 L T., 912.

[2] Ind. Contr. Act, s. 221. *Foxcroft* v. *Wood*, 4 Russ., 487. *In re Bombay Saw Mills Co. Ld.*, I. L. R., 13 Bom., 314

[3] Ind. Contr. Act, s 217.

[4] Ind. Contr. Act s. 168. *Hartford* v. *Jones*, 1 Ld. Ray., 393, this does away with the effect of *Nicholson* v *Chapman*, 2 H. Bl, 258

[5] Ind. Contr. Act, s. 217.

[6] Ind. Contr Act, s. 170. See *Bevan* v. *Waters*, Mo. & M., 235. *Scearfe* v. *Morgan*, 4 M. & W., 270 *Franklin* v. *Hosier*, 4 B & Ald., 341.

[7] 5 M & W., 180. See also *Blake* v. *Nicholson*, 3 M. & S., 167.

[8] *Miller* v. *Nasmyth's Patent Press Co.*, I. L. R., 8 Calc., 312.

that respect,[1] and although the principle has been approved, it has, however, been doubted whether the decision in the case of *Bevan* v. *Walters* applies where the animal delivered is a race-horse;[2] and it is clear that that no lien exists in the case of the agistment of milch cows,[3] as in such case no additional value is conferred on the cows, and this distinction was maintained in the case of *Sanderson* v. *Bell*,[4] and in which Holland B. said:—"The distinction is, that where any work is to be done on a chattel to improve it, or to increase its value, the lien attaches, but where it is merely delivered as in this case, to make a demand upon it, no such right can be supported."

As to the manner and circumstances under which a lien is acquired.—The person through whom it is acquired must to create a valid lien himself either have the true ownership of the property, or, at least a right to vest it.[6] If, therefore, he is not the true owner of the property; or if he has no rightful power to dispose of the same,[5] or to create a lien; or if he exceeds his authority;[6] or if he is a mere wrongdoer; or if his possession is tortious;[7] in such cases, it is obvious that he cannot ordinarily create a lien, or confer it on others.[8] Nor can a lien be acquired by the wrongful act of the person claiming it;[9] nor by his misrepresentation;[10] nor by his unauthorized or voluntary acts,[11] for in such cases he is a wrongdoer. But where there is a special agreement between the parties that no lien shall be acquired, or an agreement which in itself shows that the agent relied only on the personal credit of the employer, no question of lien can arise.[12]

Possession is necessary.—It is also essential to the validity of a lien that there should be possession of the thing by the person asserting the lien,[13] or by some one who can be considered as his agent, for the purpose of receiving

[1] *Bevan* v. *Waters*, Moo. & M., 135; per Best C. J.

[2] *Jackson* v. *Cummins*, 5 M. & W., 342, (351).

[3] 2 Cr. & M., 304, (313).

[4] *Hiscox* v. *Greenwood*, 4 Esp., 174.

[5] Ind. Insolv. Act, s. 14. *Miller* v. *Chartered Mercantile Bank of India*, 6 B. L. R., 701.

[6] *Stone* v. *Lingwood*, 1 Str., 651.

[7] *Ogle* v. *Atkinson*, 5 Taunt., 756, (763). *McCombie* v. *Davies*, 7 East., 5. *Madden* v. *Kempster*, 1 Camp. 12. *Taylor* v. *Robinson*, 8 Taunt., 648.

[8] Story on Ag., 360.

[9] *Lempriere* v. *Pasley*, 2 T. R., 485.

[10] *Madden* v. *Kempster*, 1 Camp., 12.

[11] *Stone* v. *Lingwood*, 1 Str., 651.

[12] *Walker* v. *Birch*, 6 T. R., 258. Sel. N. P., 1368.

[13] *Hutton* v. *Bragg*, 7 Taunt., 15. *Wilson* v. *Balfour*, 2 Camp., 579. *Newton* v. *Thornton*, 6 East., 25 (note). *Kinloch* v. *Craig*, 3 T. R., 119, 783. *Shaw* v. *Neale*, 4 Jur. N. S., 695; 27 L. J Ch., 444. *Heyood* v. *Waring*, 4 Camp., 291. *Debnarain Bose* v. *Leisk*, 1 Hyde, 267. *Jackson* v. *Cummins*, 5 M. & W., (350).

it.[1] Unless indeed there be a special contract preserving the lien. And, moreover, this possession must be continuous; for once a person has voluntarily parted with goods on which he has a lien, it will not revive on his recovering possession of them;[2] but it will be otherwise if the goods are taken from him by fraud or are stolen.[3]

As to what claims the right exists—The debt in respect of which the lien is claimed must be due to the agent in his own right, and not merely as agent for a third person. Thus in *Houghton* v. *Mathews*,[4] the defendants who were brokers sold in their own names a parcel of logwood belonging to one Greatham, and also some indigo belonging to one Dixon; both these sales were made to a person named Jackson who did not pay for the goods, and subsequently became bankrupt. At the time of these sales, there was a general balance both from Greatham and Dixon due to the defendants. Soon after these sales, Jackson put into the hands of the defendants the indigo in question to sell as brokers: this being the first time he had employed the defendants as his brokers. Whilst the indigo remained in the hands of the defendants, Jackson became bankrupt. Upon this the plaintiffs his assignees demanded the indigo and tendered payment of any charges which might have been incurred thereon. The defendant refused to deliver it, claiming a lien upon it, for the debt due from the bankrupt, in consequence of the goods of Greatham and Dixon sold to him, and which still remained unpaid for. Chambre J.; said "I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences; and if such a lien is not established by express authority, it does not appear to me to fall within the general principles upon which the lien of factors have been allowed ..... If this were the only point in the case, I should be of opinion that the defendants were not entitled to retain; but laying this point out of the question, I still think the debts due from the bankrupt in respect of the goods sold to him are not to be considered as due to the defendants, so as to authorize them to set off such debts in an action brought against them by the bankrupt's assignees, and that the defendants have no property or interest whatever in these debts. I never yet heard of a person being allowed to protect himself, by setting up debts in reality due to other persons, or that a factor having no demand on his principal, could by transactions with a third

[1] *Reeves* v *Cooper*, 6 Scott's Cas, 877.

[2] *Sweet* v *Pym*, 1 East, 4. See as to the effect of production to the Court of property on which a lien is claimed in cases of the winding up of Companies' Ind Comp. Act, s 162; In case of a policy broker, see Newson on Shipping, 211. Cooke's Bank. Law, 442, and p 229, *supra*.

[3] *Wallace Woodgate*, R. & M., 194.

[4] 8 B. & P., 485.

person create a new interest in himself." The rest of the Court, Rooke J. Heath J. and Lord Alvaney C. J. (the latter with some doubt) were of the same opinion, and the plaintiffs were therefore held entitled to recover. So also where an English subject in time of war who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the time that the property was neutral; this was held to be a sufficient indication to the broker that the party acted as agent and not on his own account, and therefore the broker had no lien on the policy so effected for his general balance against such agent, as between the broker and the principal.[1]

No lien for officious services.—If an agent without authority, or unnecessarily, makes himself liable to others for work done to his employer's property, no lien exists in his favour for that which he has paid under such liability.[2]

It must be for a debt due from the person for whom the agent is acting.—It must also be for a debt due from the person for whose benefit the agent is acting:[3] If therefore the person claiming the lien is aware that the person by whom he is employed is himself merely an agent, he will not be allowed to retain property belonging to that agent's principal for a debt due to the agent himself.[4] But there appears to be an exception in insurance cases, where a broker insures for an agent who conceals his principal;[5] and this is on the ground that the broker is supposed to have made advances on the credit of the policy as long as it remains in his hands.[6]

Under what circumstances the right to lien is divested or waived.—It will be lost by the abandonment of the possession of the goods in respect of which it is claimed;[7] thus in *Kruger* v. *Wilcox*,[8] a factor entitled to a lien on goods consigned to him by his principal, informed a broker employed by the principal, that the principal would sell the goods himself, and gave an order to the wharehouseman to deliver the goods to the broker, who accordingly sold and made out the bills of parcels to the principal, it was held by Lord Chancellor Hardwicke, that this amounted to a delivery of the goods in specie to the prin-

[1] *Maans* v *Henderson*, 1 East., 335. See also *Brandao* v. *Barnett*, 2 Scot. N. R, 96, (113).

[2] *Hussey* v. *Christie*, 9 East, 433.

[3] *Weymouth* v. *Boyer*, 1 Ves., 416. *Barry* v. *Longmore*, 12 A. & E, 639. *Brandao* v. *Barnett*, 2 Scott. N. R, (97).

[4] *Maanss* v *Henderson*, 1 East, 335. *Westwood* v. *Bell*, 4 Camp., (352).

[5] *Westwood* v. *Bell*, 4 Camp., 349.

[6] *Mann* v. *Forrester*, 4 Camp., 61.

[7] *Cooper* v. *Bill*, 3 H. & C., 722. *Lickbarrow* v. *Mason*, 6 East, 25 (note). *Jones* v. *Pearle*, 1 Str. 556. *McCombie* v. *Davis*, 7 East, 5. *Scott* v *Newington*, 1 Moo. & Rob., 252.

[8] Ambler, 252.

cipal, and that the lien was therefore lost For by parting with the security the agent shews that he trusts merely to the personal credit of his debtor. Thus an owner of a ship who charters it out and out to another has no lien on the goods on board such ship, he having parted with possession of the ship to the charterer.[1] But where the shipowner has reserved to himself a lien for freight under the charter upon goods shipped, the extent of his lien remains unaltered, whether the bill of lading is endorsed to a third person for valuable consideration, or the goods are delivered to the original consignee.[2] So where the arrangement was that the plaintiffs out of the sales of certain goods consigned to them, should retain their advances, and hand over the surplus to the consignor; and the consignees accordingly remitted to the consignor the balance due to him having retained what was due to them, but omitting to take into account what was due to their London firm, *held* that their lien was abandoned by handing over the balance.[3] But in *Edwards* v. *Southgate*,[4] the defendant a packer and shipping agent in London employed by one Morris, who afterwards became bankrupt, to pack and ship 86 packages of goods for Odessa, it being arranged that the bill of lading was to be in the name of the defendant, to be endorsed by him to Morris on payment. The goods were accordingly shipped, but the defendant's charges were not paid before the ship reached Odessa; on arrival and before the goods were unloaded or came to the possession of Morris or his agent, the defendant directed the goods to be returned to England, his charges not having been paid; held that the assignee in bankruptcy of Morris had no right of action for conversion, and that the defendant had a right of lien on the goods.

It will not be revived by resumption of possession —And where possession of the subject matter on which the lien is claimed is once voluntarily parted with, the lien will not be revived by resumption of possession, nor will it give any right to stop in transitu.[5] The loss of possession, however, to effect the lien must be voluntary, for if the possession is terminated by fraud, or the property over which the lien is claimed has been stolen, the lien will not be lost. Thus where the defendant sold two horses to the plaintiff who gave him bills of exchange for the price; but before the bills were due, the defendant, having a suspicion that the bills were not likely to be honoured, went to the plaintiff and asked him to take them back, and give up his property in the horses, which were then at livery in the defendant's stables.

[1] *Hutton* v. *Bragg*, 7 Taunt, 14, (27). See also *Kinloch* v *Craig*, I. T R, 119, 783

[2] *Small* v. *Moates*, 9 Bing, 574, approved in *Gladstanes* v *Allen*, 12 C. B, (221). *See also Kerr* v. *Deslandes*, 10 C B N. S., 205

[3] *Bligh* v *Davies*, 28 Beav, 211

[4] 10 W R, Ex. (Eng) 528

[5] *Sweet* v. *Pym*, 1 East., 4. *Lackbarrow* v. *Mason*, 2 T R, 63 *Coombs* v. *Bristol and Exeter Ry. Co.*, 27 L. J Ex., 401. *Artaza* v *Smallpiece*, 1 Esp, 23

The plaintiff objected; the defendant afterwards saw the plaintiff again, who in the course of conversation said, "that the horses shall not be taken away till they were paid for" The plaintiff, however, on pretence of taking a ride, sent for the horses, but did not return them, and the defendant discovering this, and the place at which the horses were stabled, said to the stable-keeper that he had been swindled out of them, and he was allowed to take them away. The plaintiff sued for conversion, the defendant contended that he had a lien under a special agreement. Bost C. J., left it to the jury to say whether the plaintiff meant by his statement to give the defendant a lien, and whether if he did so, he fraudulently took them away to destroy the lien. The jury found for the defendant;[1] but as has been already stated the case of the lien of a policy-broker seems to be an exception to this rule,[2] although even in such cases there are some cases in which the rule applies.[3]

Lien may be lost although possession is not parted with.—It may, it appears, be lost in some cases, even where possession is never given up, as where an agent having a lien on certain goods causes them to be taken in execution at his own suit, as in *Jacobs* v. *Latour*.[4] And the reason of this is, that to sell, the sheriff must have had possession; and the subsequent possession of the agent is acquired from a person who has no authority to confer a lien; but if the property be taken from an agent under an execution against his principal at the suit of some third person, the agent will still have a right to insist upon his lien on the goods.[5]

It is lost when the debt on which it is claimed is satisfied.—The lien is also lost, when the debt in respect of which the lien is claimed, is satisfied; thus it has been held that the release of a debt by the execution of a composition deed, puts an end to the lien which a person may claim in respect of the debt.[6] So also does the payment over of a balance to the principal.[7]

Not lost by goods being wharehoused.—But the lien will not be lost by the goods being put into the possession of a depositary or bailee for safe custody, as in the case of goods put into the possession of a wharehouseman or wharfinger for that purpose. Thus in *Wilson* v. *Kymer*,[8] the consignees of a West India cargo deliverable by bill of lading to them or their assignees, he

[1] *Wallace* v. *Woodgate*, R. & M., 194, 1 C. & P., 575

[2] *Westwood* v. *Bell*, 4 Camp, 349. *Whitehead* v. *Vaughan*, Cooke's Bank Law, 442 (6th ed.) *Levy* v *Barnard*, 8 Taunt., 149.

[3] *Levy* v. *Barnard*, 8 Taunt., 149.

[4] 5 Bing, 130.

[5] *Jacobs* v. *Latour*, 5 Bing., 130, (132).

[6] *Cowper* v. *Green*, 7 M. & W., 633. *Back* v. *Shippam*, 1 Ph., 694. *Hewison* v. *Guthrie*, 2 Bing. N. C., 759.

[7] *Bligh* v. *Davies*, 28 Beav., 211

[8] 1 M. & S., 157.

or they paying freight for the same, endorsed it to the defendants their brokers for advances made by them, and the cargo on its arrival was landed at the West India docks in the name of the consignees, but was entered at the custom house by the defendants in their own names, and afterwards the defendants obtained delivery from the West India docks under an order from the consignees for that purpose, and not under the bill of lading. The Court held that the defendants had obtained the goods not by the strength of their title as endorsees, but as agents for them, and that the Captain and his owners had a lien for the freight, not only whilst the goods were on board the ship, but also in the West India docks.

Lien lost by misconduct —A lien may be also lost by misconduct, thus where the plaintiff pawned a watch and chain with a person named Chapman a pawnbroker, and the plaintiff delivered the duplicate tickets to the defendant for the purpose of getting the watch and chain out of pawn, which the defendant did paying to the pawnbroker the sum for which they were pledged and interest thereon: the plaintiff thereupon demanded the watch and chain from the defendant, who denied possession of the articles, although admitting receipt of the ticket, and that the watch had once been in his possession; the plaintiff moreover informed the defendant through an intermediary. that he would allow him "in account" any sum he might have paid to redeem the goods, and further himself wrote to a person in the employ to the defendant, a letter containing these words "before we can come to a just settlement, will Mr Cliff give up my watch &c. upon receiving in full whatever he has been repaid for redeeming them." This letter was not replied to It was contended that defendant had a lien on the watch and chain as no tender had been made to him of the money advanced. The Court held that as the defendant had parted with the possession of the articles and would not say to whom he had delivered them, he had no right to insist upon a formal tender [1] So the lien will be lost if the person having a lien on goods wrongfully parts with them, as for instance by pledge [2] So also it will be lost, if a person having a lien upon goods, when they are demanded of him claims to retain them on a different ground, making no mention of the lien, for he will then be held to have waived it.[3] But a claim to lien of a larger amount or on a different account than that for which the party is entitled to it, may in some cases amount to a dispensation with a tender.[4] But claiming a lien for the keep of horses and the lodging of men for a longer time than the person is entitled to it, will not exonerate the owner from making a tender.[4]

[1] *Jones* v. *Cliff*, 1 Cr. & M., 540

[2] *Scott* v. *Newington*, 1 Moo. & Rob, 252.

[3] *Boardman* v. *Sill*, 1 Camp, 410 (note) *Dirks* v *Richards*, 4 M. & G., 574. *Weeks* v. *Goode*, 6 C. B N. S. 367.

[4] Per Willes J., in *Allen* v. *Smith*, 12 C. B. N. S., 638, (645), but see *Scarfe* v. *Morgan*, per Alderson, B. 4 M. & W., (281).

As to whether the lien is lost by taking security.—Next as to whether the lien is destroyed by taking a security for the debt. It was held in *Cowell* v. *Simpson*,[1] that a solicitor had by the acceptance of a security waived his lien, and again in *Hewison* v. *Guthrie*,[2] that if a security is taken for a debt for which a person has a lien upon the property of his debtor, such security being payable at a distant date, the lien is gone. But in *Angus* v. *McLachlan*,[3] in which both these cases were referred to, the matter has been considered by Kay J.: there, it was held that an innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at Common law upon such goods for the amount of such charges, unless there is something in the nature of the security, or in the circumstances under which it was taken which is inconsistent with the existence or continuance of the lien and therefore destructive of it. And it seems that if security be taken, as for instance, a bill of exchange, and it be dishonoured, the lien will not be gone.[4] And where the question was, whether a right of lien and power of sale by virtue of a power of attorney over certain shares pledged with the plaintiffs by the defendants as security for the repayment of a loan originally secured by a first promissory note, was lost by the plaintiffs subsequently taking from the defendant a second promissory note in lieu of the first which was receipted and returned;—it was held, that the original debt continued to exist, that the first promissory note and the shares were given as a security for that loan; and that the second promissory note was also given for that loan, no new debt being created, and that therefore the lien was not lost.[5]

Lien not ordinarily lost by set-off.—A set-off, however, cannot be considered as destroying a lien, unless it be so agreed upon between the parties.[6] It may, however, be that an arrangement may be entered into between the parties that the work to be done on account of which the lien is to be claimed, should be paid for in a particular manner and out of a particular fund; and that being the only debt on which the lien is claimed, it might be an answer to it in that way; or, if the debt having been created, the parties come to a new arrangement, and agree that the debt shall be satisfied in a particular way, then the lien is lost; for then it would be in truth a debt paid.[7]

Effect on lien, where agent proves in bankruptcy for the debt on which it is claimed.—The lien will, in England, be divested by the agent

[1] 16 Ves, 230

[2] 3 Scott, 298.

[3] L. R., 23 Ch D, 330.

[4] *Stevenson* v. *Blakelock*, 1 M & S, 535, (544).

[5] *Stewart* v. *Delhi and London Bank, Ld.*, 17 W R, 201.

[6] *Pinnock* v *Harrison*, 3 M. & W., 532

[7] *Ibid.*, per Alderson B., p. 539.

proving for his debt in bankruptcy, for in such case, proof under commission is equivalent to payment.[1] The question whether bankruptcy of a person does away with an express contract establishing a lien was raised in *Clarke* v. *Fell*.[2] There, a tradesman undertook to work upon a carriage delivered to him for a person to whom he was indebted, and it was agreed that the work should be paid for *in ready money;* the tradesman subsequently became bankrupt, the carriage passed into the hands of his assignees. The repairs were done and the owner of the carriage demanded the carriage from the assignees, and proposed to strike off the cost of the repairs from the amount which was owed to him by the tradesman. The assignees refused to deliver, except for ready money, and they alleged that the repairs were completed after the bankruptcy. The owner contended that the sums were mutual debts at the time of the bankruptcy and ought to be set off against each other in accordance with s. 50 of 6 Geo. IV, c. 16, held that there was no mutual credit of a nature to exclude the lien. Littledale J., said:—"I think, under the circumstances of this case, there was no mutual credit of a nature to exclude the lien insisted upon by the defendants. If there had not been a contract to pay ready money, I should have been of a different opinion; for although in that case there would still have been a lien on the carriage for the work done by the bankrupt, yet, as the bankrupt was also indebted to the plaintiffs, the question would have been on which side the balance lay, and that was in favour of the plaintiffs. But the agreement to pay ready money makes all the difference." Taunton J. said:—"For some purposes there was a mutual credit in this case; if the plaintiffs had gone before the commission to prove their demand on the bill, there was so far a mutual credit that the assignees might have said:—'There is so much due to the estate for repairs, the commissioners must state the exact balance, and allow that and no more to be proved' ..... but no such proceeding took place, if it had, the right to detain would have been gone, because the assignees would, in this way, have received payment of their demand. The question here, therefore, is, whether the credit was such as, on the bankruptcy of the tradesman, annulled his bargain with the plaintiffs, that bargain being to the effect, that unless he was paid in ready money he should be at liberty to detain the carriage. I think the bankruptcy did not annul that bargain nor deprive the bankrupt's estate of the benefit of that lien." Patterson J., said:—"I admit that the law of mutual credit under the Bankrupt Act goes further than the ordinary law of set-off: *Rose* v. *Hart*,[3] *Buchanan* v. *Findlay*,[4] and *Rose* v. *Sims*[5] shews this; and I agree with Mr. Cleasby that there is a mutual credit within the Act,

[1] *Ex-parte Hornby, in re Tarleton*, Bucks Bank Cas, 351

[2] 4 B. & Ald, 404.

[3] 8 Taunt., 499.

[4] 9 B. & C., 738.

[5] 1 B. & Ald., 521.

where a debt, or that which will terminate in a debt, exists on each side; but the question in this case, is, whether the bankruptcy of one party does away with an express contract establishing a lien for payment of a particular debt. I find no case which decides that it can."

Lien lost by act of party claiming it.—The lien may also be divested by act of the party claiming it. Thus if the lien is claimed by a firm of attorneys, and the members of that firm dissolve partnership, the dissolution will operate as a discharge by the firm of the relation of attorney and client, and the lien will be lost.[1]

Ordinarily property detained as lien cannot be sold.—Lastly, property detained as a lien cannot be sold unless by consent of the owner.[2] Tindal C. J., in *Smart* v. *Sandars*[2] says "The relation of principal and factor, where money has been advanced on goods consigned for sale is not that of pawner and pawnee. The goods are delivered for sale, on account of, and for the benefit of the principal, and not by way of security to indemnity against a lien, although they operate as such a security, the factor having a lien upon them, or upon their proceeds, when sold, for the amount of his claim against the principal. The authority of the factor whether general or special, may become irrevocable when advances have been made; but there is nothing in the transaction from which can be inferred ..... that it was part of the contract, that at any time the goods should be forfeited, or the authority to sell enlarged, so as to enable the factor to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time, and for that price. Nor can we find any principle in the law by which, independently of contract, such authority is given."

Maritime Lien.—A maritime lien, must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged ..... It commences and there it continues until it comes to an end.[3] It takes place in an action *in rem* from the moment of the arrest of the ship.[4] It was formerly held that a master of a ship had a maritime lien on the ship for disbursements;[5] but these decisions have lately been overruled in the case of *Hamilton* v. *Barker The Sara*,[6] and it has been therein definitely decided by the House of Lords that

[1] *McCorkindale, in re*, I L. R, 6 Calc, 1

[2] *Smart* v. *Sandars*, 16 L. J. C. P., (45). *Jones* v *Thurloe*, 8 Mod, 173 *Jones* v *Pearle*, 1 Str., 557.

[3] *The Two Ellens*, L. R., 4 P. C., (169). See also *Harmer* v *Bell*, 7 Moo. P. C., 284.

[4] *The Cella*, L. R, 13 P D, 88

[5] *The Mary Ann*, L R., 1 A & E., 8. *The Feronia*, L R., 2 A. & E, 65 *The Ringdove* L. R., 11 P D, 120.

[6] L. R., 14 App. Cas., 209.

the Admiralty Court Act 1861 (24 Vic. c. 10) does not give the master a maritime lien on the ship for disbursements. Lord Macnaghten in his judgment in this case said :—"It is clear that at the time of the passing of the Admiralty Court Act 1861 disbursements made by the master of a ship in the ordinary course of his employment did not create any lien in his favour.[1] It is equally clear that neither the Act of 1861 nor any subsequent Act, has in terms conferred a maritime lien for the master's disbursements. Section 10 of the Act of 1861 declares that "the Court of Admiralty shall have jurisdiction over ..... any claim by the master of any ship for disbursements made by him on account of the ship." That section gave the Court jurisdiction to entertain suits falling within its scope, and of itself it did nothing more. The jurisdiction, as the Act declared, might be exercised either by proceedings *in rem*, or by proceedings *in personam*. It thus became competent for the Court of Admiralty, on the master preferring his claim for disbursements, to arrest the ship on account of which the disbursements were made. But in the absence of a maritime lien the arrest could not effect a subsisting mortgage, or any valid charge upon the ship. So far the matter seems clear. And if the question depended solely upon the general law before the Act of 1861, and upon the language of that Act, there would be no ground for the contention put forward on behalf of the master in the present case. It cannot, however, be disputed that since the year 1865, it has uniformly been held that the claim of a master for his disbursements is to be preferred to the claim of a mortgagee. Dr. Lushington arrived at that conclusion without any hesitation in the case of the *Mary Ann*.[2] His view was adopted and approved by Sir R. Phillimore. It was accepted by the Court of Appeal in the case of *In re Grande Do Sal Company*,[3] and it has been followed in the *Ringdove*[4] by Sir James Hannen." His Lordship then discussed s. 191 of the Merchant Shipping Act of 1854, and the *Caledonian*[5] and the *Glentanner*[6] decided thereunder and the *Mary Ann*, and after considering that the *Glentanner* was based on a construction of the Act of 1854, which was clearly erroneous, was of opinion that the decision of the *Mary Ann*, and the practice of the Admiralty Court, which rested upon it, could not be supported. A claim to a lien for disbursements was made and allowed in the *matter of the ship Portugal*[7] under 24 Vic. c. 10, in which case the *Feronia*[8] and the *Mary Ann*[9] were cited as authorities for the lien; this case so far as this point is concerned, would after the case in the House of Lords last cited, probably be held to be law no longer in this country.

[1] See *Bristow* v. *Whitmore*, 9 H. L. Cas., 391.
[2] L. R., 1 A. & E., 8.
[3] L. R., 5 Ch. D., 282.
[4] L. R., 11 P. D., 120.
[5] Swa., 17.
[6] Swa., 415.
[7] 6 B. L. R., 323.
[8] L. R., 2 A. & E. 65.
[9] L. R., 1 A. & E., 8.

The Master's lien for wages—A master of a ship has, however, a lien on the ship for his wages under s 191 of the Merchant Shipping Act of 1854, as adopted in India by s 58 of Act I of 1859,[1] the Statute, however, did not enable the master to recover for his wages in the Admiralty Court if there was a special contract regarding his wages, but under s. 10 of the Admiralty Court Act of 1861 jurisdiction was given to the Admiralty Court over any claim for seamen's wages, whether under special contract or otherwise, and also over any lien by the master for wages He has also a lien, on the proceeds of the sale of the ship, for wages due to him at the time of the sale, and his lien in such case is prior to that of a bottomry bond-holder who had advanced money to enable the ship to continue her voyage, and who had, in satisfaction of his claim under the bond, put up the ship for sale[2] Towage services are not the subject of a maritime lien[3]

[1] *In the matter of the Barque Anne*, 2 Hyde, 273

[2] *In the matter of the ship Portugal*, 5 B L R, 258, 6 B L. R, 323, (331). See also *Macqueen* v *Fuzzul Mahomed, In the matter of the "Good Success,"* 1 Ind. Jur N. S, 303

[3] *Westrup* v. *Gt Yarmouth Steam Company*, decided by Kay J., Ch. D., Dec 2nd, see L. T. for December 14th, 1889.

LECTURE VIII.—(*Continued*)

RIGHT OF THE AGENT AGAINST HIS PRINCIPAL.

PART I. THE RIGHT TO STOP IN TRANSIT.

PART II. RIGHT TO INDEMNITY.

Part I. Stoppage in transitu—What it is—When it arises—Who may exercise the right—As to whether a factor may stop—It may be exercised by one who stands in a position of a vendor—By a duly authorized agent—Whether by a surety—By person taking a bill of lading—But not by person who has merely a right to a lien—The right where goods are paid for by bill—During what period the right continues—As long as goods are in transit—When goods are in transit—Effect of wharehousing goods—Question whether goods are held by person as carrier or wharehouseman—What is the actual delivery which ends transit—Where special arrangement—Vendee may anticipate termination of transit—Effect of part delivery—How the right may be lost—By an assignment to second purchaser whilst in transit—Such assignment must be made in good faith—Whether assignment must be for valuable consideration—Past debts whether good consideration—Right not lost until conditions of bill of lading fulfilled How stoppage is made where instrument of title is assigned to secure specific advance—Whether effected by pledge of bill of lading—Mode of effecting stoppage.

Part II. Right to indemnity—When right is claimable—Against consequences of lawful acts—Requisites entitling agent to recover—Examples—Whether commission agents to be indemnified against all liabilities incurred, including accommodation bill—For payment made in accordance with custom—Where agent incurs loss without default—Where by his default—For loss from imprudent acts—Not if agent misconducts himself—Whether for voluntary advances—For payments made without special authority, but adopted—Where special contract which is *ultra vires* is adopted—Must be for legal act—Whether for wagering contracts—When for advances made after revocation of authority—For acts done in good faith though to injury of third persons—Wrong doers not entitled to be indemnified—No indemnity for criminal acts—Indemnity against want of skill and negligence of principal—For negligence in looking to tackle—Whether relationship is master and servant or bailor and bailee—When principal personally interferes—Where master knows and servant does not know of defect—Exception to rule that principal is bound to compensate for his negligence—Fellow servants injury by—Suit may be brought by executor for compensation.

The right of stoppage in transitu.—The right to stop in transit, is the right which a seller, or, as will be seen, a person in the position of a seller, who has parted with possession of goods and who has not received the whole price, has of stopping the goods whilst they are in transit to the buyer, if the latter has become insolvent.[1] This right to stop means not only the right to countermand

[1] Ind. Contr. Act, s. 99.

delivery to the vendee, but to order delivery to the vendor.[1] It arises solely upon the insolvency of the buyer and can be exercised only against him. And a person, probably would be considered insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.[2] Failure to pay one just debt if incapability to pay is proved, might be probably sufficient.[3] It appears to be necessary that the property should have been in the possession of the person claiming the right,[4] whether actual physical possession is intended is not clear. A most exhaustive account of the growth of this right to stop in transit is to be found in the case of *Gibson* v. *Carruthers*.[5]

Who may exercise this right.—Whether the doctrine existed in a factor purchasing with his own funds goods for his principal, was in early times a matter of some doubt. In *Feise* v. *Wray*,[6] it was contended that no such right existed in a factor, but as the point was unnecessary for the decision it cannot there be said to have been decided. Laurence J., however, with reference to the contention that the right of stoppage in transitu applied *solely* to the case of vendor and vendee, said:—"If that were so, it would nearly put an end to the application of that law in this country; for I believe it happens for the most part that orders come to the merchants here from their correspondents abroad to purchase and ship certain merchandize to them: the merchants here, upon the authority of those orders, obtain the goods from those whom they deal with, and they charge a commission to their correspondents abroad upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But at any rate this is a case between vendor and vendee, for there was no priority between the original owner of the wax and the bankrupt." The right of stoppage is in England peculiar to *one who stands in the situation of vendor*.[7] In all probability that would be the the construction put upon the word "seller" in s. 99 of the Contract Act. With reference to the questions as to in whom the right of stopping in transit exists; and as to the effect of the cases I have cited, the remarks of Fry L. J., on the subject may be usefully referred to; the remarks I refer to are to be found in the case of *Cassaboglou* v. *Gibb*,[8] and are as follows: "Since the lead-

[1] See *per Dr. Lushington, The Tigress*, 32 L. J. Adm., 97.

[2] See Ind. Contr. Act, s. 96.

[3] See Smith's Merc Law, 550, (ed. 1877).

[4] See Ind. Contr. Act, s. 99. See, however, as to this in England, *Jenkyns* v. *Usborne*, 7 M. & G., 768; 13 L. J. C. P., 116.

[5] 8 M & W., 337.

[6] 3 East., 93.

[7] *Tucker* v. *Humfrey*, 4 Bing., 260. *Ireland* v *Livingston*, L. R., 5 H. E., 395. *Blackburn on Sale*, 844 *Patten* v. *Thompson*, 5 M & S., 310.

[8] L R., 11 Q. B. D., 806

ing case of *Lichbarrow* v *Mason*,[1] the person who stops goods in transitu must be a consignor, but there are numerous cases in which the right has been allowed of stopping in transitu without the relationship existing of vendor and purchaser. This right to stop in transitu is explained by Lord Abinger in *Gibson* v. *Carruthers*,[2] and whether founded on some principle of Common law or of equity, as discussed by Lord Abinger in that case, it is a right which the Courts have given effect to as a just and equitable right. The first case on the subject, namely, that of *Feise* v. *Wray*,[3] was cited to show that in the case of the foreign agent buying for his English principal there is the relationship of vendor and purchaser, but Grose J., there says, "What is this but the plain and common case of the consignor of goods who has not received payment for them, stopping them in transitu before they get to the hands of the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal merely, I should find a difficulty in saying that it did;" and Le Blanc, J., says, for the purpose thus of stopping the goods in transitu they stood in the relative situation of vendor and vendee, through perhaps not so as for all purposes.' In *Falk* v. *Fletcher*[4] Willes J., says, 'the factor of the plaintiff being agent for DeMattos is no doubt a circumstance that is not to be lost sight of. But in the sense of being the person who put the goods on board, he is in the same condition as if he had been an ordinary unpaid vendor. For this the case of *Feise* v. *Wray*,[5] is an authority, although that was a case of stoppage in transitu, then in *Ireland* v. *Livingston*,[6] Cleasby, B., says that there was there 'not a mere contract between vendor and purchaser, although after the goods were shipped a relation like that of vendor and vendee might arise, no doubt in that case Lord Blackburn uses stronger language, and says that, 'the legal effect of the transaction is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage in transitu,' but by the legal effect of the transaction he means the legal effect of an analogous contract to that of a contract of purchase and sale. It is important also to observe that Lord Chelmsford, in that case, puts the matter so as to exclude the existence of any contract of purchase and sale. He says, 'I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage in transitu.'"

The remarks of Bayley J., and Lord Ellenborough C. J., in *Usparicha* v. *Noble*,[7]

[1] 1 Sm L. C., 753.
[2] 8 M. & W., 321.
[3] 3 East., 93.
[4] 18 C. B. N. S., 403
[5] 3 East., 93.
[6] L R, 5 H L, 395
[7] 13 East., 332, (337—338).

further point to the fact that an agent who has purchased goods in his own name, or on his own credit, so as to make himself liable to the vendor, would have a right of stoppage. And the case of *Kinlock* v. *Craig*,[1] also is clear to the effect that a person consigning goods to a factor has under certain circumstances a right of stoppage in transitu. And the case of *Hawkes* v. *Dunn*,[2] decided that an agent of a bankrupt who had made himself responsible for the price of goods, might stop them in transitu. The case of *Bhola Nath* v. *Baij Nath*,[3] decided in this country that an agent who had purchased goods with his own funds on behalf of another was in the position of an unpaid vendor and had a right of stoppage. And in that case the cases of *Feise* v. *Wray*,[4] and *Ireland* v. *Livingston*,[5] where both relied upon, which former case is again referred to in *G. I. P. Ry. Company*, v *Hanmandas Ramkison*.[6]

By duly authorized agent.—Although a duly authorized agent acting for an unpaid vendor would have the right to stop in transit, if the buyer becomes insolvent, in such cases as the vendor might himself exercise it; yet an unauthorized agent cannot do so, even though the unpaid vendor subsequently ratifies the act done by him.[7] As whether or no the transit is still in existence or is terminated, section 200 of the Contract Act equally excludes such a ratification.[8]

By sureties.—It also may be exercised by a surety who has, on default of the principal debtor, paid or performed all that he is liable for, as he then stands invested with all the rights of the principal debtor.[9] Supposing therefore a right of stoppage to be with such debtor, the surety might avail himself of it. Further it appears that a consignor may exercise the right of stoppage, even when there is an unadjusted account-current with the consignee.[10]

By person taking bill of lading.—So also an agent of a vendor to whom the vendor has endorsed a bill of lading may stop the goods in his own name.[11] So also a person who buys goods for another on his own credit, and then takes bills of lading endorsed for delivery to his own order, and endorses

[1] 3 East., 119.

[2] 1 Cr. & J., 519.

[3] 2 Agra H. C, 11.

[4] 3 East., 93.

[5] L. R. 5 H. L, 395.

[6] I. L R, 14 Bom, (65).

[7] Ind. Contr. Act, s 200

[8] *cf. Bird* v *Brown*, 4 Ex, 786, and *Hutchins* v *Nunes*, 1 Moo. P. C. C. N. S., 243

[9] Ind. Contr. Act, s. 140. See *Imperial Bank of London* v. *London and St. Katherine's Dock Company*, L. R., 5 Ch. D, 195

[10] *Wood* v. *Jones* 7 D. & R., 126; but see *Virtue* v *Jewell*, 4 Camp., 31, which, however, has been referred to as questionable by Mr. Benjamin in his work on sale at p. 849.

[11] Act IX of 1856, ss. 1, 2. *Morrison* v. *Gray*, 2 *Bing.*, 260.

the bill to the person for whom he has bought, is a vendor for the purpose of stoppage in transitu [1]

No right to stop in satisfaction of a lien.—In conformity with the rule that the right is only exercisable by an unpaid vendor, (or one standing in the situation of a vendor), a person who has merely a right of lien upon goods for work done or trouble of expense incurred about them, has no right to stop them in their transit to the owner for the satisfaction of his lien.[2] The unpaid vendor's right of stoppage is paramount or of a higher nature than a carrier's lien for a general balance;[3] and also it seems to the right of an attaching creditor,[4] and in certain cases to a demand for freight.[5]

Where the price of the goods has been paid by bill.—Although as has been seen a person who has sold goods on credit which has not expired, has until actual payment, a right to stop in transit [6] It has been a question whether this right is defeated by taking payment by bill of exchange.[7] Thus in *Kinloch* v. *Craig*,[8] a consignee. a factor, had accepted bills for the amount of the purchase money of goods, both the purchaser and the factor being bankrupts; Ashurst J., said:—It is contended that the consignor has no right to stop the goods in transit, where the value of them has been paid. I admit the position to be true as between the consignor and consignee, but the facts of the case do not admit of the application of it, for they have not been paid for, and there is a great difference between payment and a liability to pay." As to this as is said by Mr. Blackburn "it seems however, very well settled that where the vendor is no otherwise paid than by receiving the insolvent purchaser's acceptances, he may stop the goods, though he may have negotiated the bills, and they are still outstanding and not yet at maturity."[9] And this is also laid down in *Bhola Nath* v. *Baij Nath*.[10] The effect of taking a bill of exchange or other security is, however, one of intention; the rule appearing to be, that in the absence of a contract to the contrary a negotiable instrument is only considered to be conditional, the vendor's right to the price reviving on non-payment of the security.[11]

[1] *The Tigress*, 32 L. J. Adm., 97.

[2] *Sweet* v. *Pym*, 1 East, 4.

[3] *Oppenheim* v. *Russell*, 3 B. & P., 42.

[4] *Smith* v. *Goss*, 1 Camp., 282. *Bhola Nath* v. *Baij Nath*, 2 Agra H. C., 11.

[5] *Mercantile and Exchange Bank* v. *Gladstone*, L. R., 3 Ex, 233.

[6] Ind. Contr. Act, s. 99. *Bohtlingk* v. *Inglis*, 3 East, 381.

[7] See *Blackburn on Sale*, 327.

[8] 3 T. R., 119.

[9] *Blackburn on Sale*, 337.

[10] 2 Agra H. C., 11.

[11] *Benjamin on Sale*, 733. *Kearslake* v *Morgan*, 5 T R, 515, (518) *Puckford* v. *Maxwell*, 6 T R., 52. *Owenson* v. *Morse*, 7 T. R, 64. *James* v. *Williams*, 13 M. & W, 828. *Griffith* v. *Owen*, 13 M. & W. 58. *Plimsley* v. *Westley*, 2 Bing. N. C, 249 *Belshaw* v. *Bush*, 11 C. B., 191. *Currie* v. *Misa*, L. R., 10 Ex., 153, (163).

But if a dispute as to the intention of the parties arises, the question is one of fact; the intention that a bill or note is to be taken as absolute payment for goods sold, having to be clearly shown and not deduced from ambiguous expressions.[1]

During what period the right continues.—The right continues as long as the goods are in transit. Goods are considered in transit, whilst they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and have not come into his possession, or the possession of any person on his behalf otherwise than as being in the possession of the carrier, or as being so lodged.[2]

When goods are in transit.—If goods, therefore, are in the possession of the carrier, *quâ* carrier, they are still in transit, and are liable to be stopped,[3] and that is so, even if the carrier has been named by the vendee.[4] But where the purchaser sends his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver free on board, then the ship is the place of delivery, and the transit is at an end, just as much as was said in *Van Casteel* v. *Booker*,[5] as if the purchaser had sent his own carts, as distinguished from having the goods put into the cart of a carrier. And this is so, if the ship sent is the general ship of the purchaser.[6] The right of stoppage may, however, even in such case be preserved to the vendor, if he take a bill of lading in such term as to indicate that he reserves a *jus disponendi* over the goods; and this can be, and was, done by a vendor in the case of *Turner* v. *Trustees of the Liverpool Docks*,[7] by taking a bill of lading, and making the goods deliverable to his order; or it may be done by, transmitting the bill of lading endorsed in blank to an agent to be delivered only in case payment is made.[8] As to the effect of making goods deliverable to the shipper's order, see *Ogg* v. *Shuter*.[9] Supposing however, that a vendor is ignorant of the fact that the vessel in which he is shipping his goods belongs to the purchaser, it appears to be an open question whether such delivery could properly be held to be

[1] *Goldshede* v. *Cottrell*, 2 M. & W., 20. *Steadman* v. *Gooch*, 1 Esp., 5.

[2] Ind. Contr. Act, s. 100. *Kendal* v. *Marshall*, L. R., 11 Q. B. D, 356, (364, 365). *Ex-parte Rosevear China Clay Company*, L. R., 11 Ch. D., 560.

[3] *Mills* v. *Ball*, 2 B. & P., 457.

[4] *Holst* v. *Pownal*, 1 Esp., 240. *Rosevear China Clay Company*, 2 L R., 11 Ch B, 560, *Lickbarrow* v. *Mason*, 1 Sm L. C., 7th ed., 818 notes.

[5] 2 Ex, 691.

[6] *Berndston* v. *Strang*, per Sir W. Page Wood V. C, L. R., 4 Eq, 481, (491).

[7] 6 Ex., 543. *Schotsmans* v. *Lancashire and Yorkshire Ry. Co.*, L. R., 2 Ch., 332, (336), per Lord Chelmsford.

[8] *Key* v. *Cotesworth*, 7 Exch., 595, and see *Hoare* v. *Dresser*, 7 H. L. Cas., 290.

[9] L. R., 1 C. P. D., 47; 44 L. J. C. P., 161.

complete[1] Where the purchaser charters a ship for the purpose of the carriage of the goods bought by him, the question, whether the transit is at end when the goods are delivered on board is, "is it the man's own ship that receives the goods, or has he contracted with some one else *qud* carrier to deliver the goods, so that according to the ordinary rule as laid down in *Bohtlingk* v. *Inglis*,[2] and continually referred to as settled law upon the subject, the transitus is only at an end when the carrier has arrived at the place of destination and has delivered the goods.[3] Where the purchaser requires the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage, the transit will be ended when the goods are on board.[4] The question whether the vessel chartered by the buyer is to be considered his own ship, depends on the nature of the charter-party. "If the charterer is the owner for the voyage, that is, if the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then a delivery on board such a chartered ship world be delivery to the buyer; but if the owner of the vessel has his own captain and crew on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use of the vessel, then a delivery by the vendor of goods on board, is not a delivery to the buyer, but to an agent for carriage."[5] But otherwise when the goods are only arrived in a vessel at a port for orders, though the vendee is to give orders for their ultimate destination.[6] Where the contract is to deliver cargo free on board at a certain place, no mention being made of the destination of the cargo, it has been held in *Rosevear* v. *China Clay Company*,[7] that the transit does not cease on shipment, and that the mere circumstance of the non-disclosure of the destination of the cargo is immaterial and does not affect the vendor's right to stop in transit.

Whether the transit is the original transit or a fresh one —Other and more difficult questions arise when it is necessary to determine whether or not the transit upon which the goods are going when stopped, is the original or a fresh transit, or whether the goods have reached a place from which fresh orders from the purchaser are required to give them a new destination. This point has been dealt with in *Bethell* v. *Clark and Company*[8] in the

[1] Per Lord Chelmsford in *Schotsmans* v. *Lancashire and Yorkshire Ry. Co.*, L. R., 2 Ch., (535).

[2] 3 East, 381.

[3] *Berndston* v *Strang*, L. R., 4 Eq, 481, (492).

[4] *Berndston* v *Strang*, L. R., 4 Eq., (490)

[5] *Benjamin on Sale*, 856.

[6] *Fraser* v *Witt*, L R, 7 Eq, 64.

[7] L. R, 11 Ch. D., 560.

[8] L. R., 20 Q B. D., 615.

Court of Appeal. There, goods were purchased by merchants in London of manufacturers in Wolverhampton, the purchaser writing to the vendors directing them to consign the goods to the "*Darling Downs*, to Melbourne, loading in the East India Docks." The goods were delivered to carriers to be forwarded to the ship. The vendors being informed of the purchaser's insolvency gave notice to the carriers to stop the goods, but too late to prevent their shipment on board the *Darling Downs* The ship sailed for Melbourne, but before she arrived, the vendors claimed the goods from the shipowners as their property; held that the transit was not at an end till the goods arrived at Melbourne. Lord Esher said; "There has been a difficulty in some cases where the question was, whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this; where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage in transitu exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or by the directions of the purchaser to the vendor, but are in transitu afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit."

Transit may not be ended even where the goods are wharehoused.—The transit, however, may not be ended even though the goods are deposited in a wharehouse to which they have been sent by the vendor on the purchaser's order. In such cases, in order to determine whether the transit has ceased or not, the question to be asked in all cases of that and a like kind is,—in what capacity are the goods held by the wharehouseman or other custodian ?[1] Has the person who has the custody of the goods got possession as an agent to forward from the vendor to the buyer, or as an agent to hold for the buyer ?[1] If he is an agent to forward, the transit is not at an end ;[2] but if he is agent to hold for the buyer then the transit has ceased,[3] although the place be not that of the ultimate destination of the goods.[4]

[1] *Blackburn on Sale*, 353 *Bethel* v. *Clark*, L. R, 19 Q B D (558), per Mathew J.

[2] *Smith* v. *Goss*, 1 Camp., 282. *Coates* v. *Railton*, 6 B. & C, 422 *Jackson* v. *Nichol*, 5 Bing N. C., 508 *Ex-parte Barrow, in re Wordsell*, L R., 6 Ch D, 783.

[3] *Leeds* v. *Wright*, 3 B & P, 320. *Scott* v *Pettit*, 3 B & P., 469. *Valpy* v. *Gibson*, 4 C. B., 837. *Ex-parte Gibbes*, L. R, 1 Ch D., 101. *Kendall* v *Marshall*, L R., 11 Q. B. D., 356.

[4] *Ex-parte Miles, in re Issacs*, L R., 15 Q. B. D., 39. *Kendall* v *Marshall*, L. R., 11 Q. B. D., 356.

Whether goods are held by person as carrier or wharehouseman.—The question whether, *when the goods have reached their destination*, they remain in the hands of the carrier *quâ* carrier, or if landed, whether the wharehouseman is the agent of the buyer to receive them and hold them on the buyer's account, is, (as the question of possession is itself ambiguous) to be gathered from the intention of the parties,[1] from their minor acts If the possessor of the goods has the intention to hold them for the buyer, and not as agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end; but says, Mr. Blackburn,[2] I apprehend that both these intents must concur, and that neither can the carrier, of his own will, convert himself into a wharehouseman, so as to terminate the transitus without the agreeing mind of the buyer (*James* v. *Griffin*;)[3] nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer (*Jackson* v. *Nichol*,)[4] In *James* v. *Griffin*,[5] the bankrupt sent his son to land the goods at the wharf where he was accustomed to have goods landed and kept until he carried them away in his own carts; but he at the same time told his son, that he would not meddle with the goods, and that he did not intend to keep them, and that the vendor ought to have them. The goods were, however, landed, by the son's directions, at the wharf, and there stopped in transit by the vendor. The Court (Abinger C. B, dissenting) held the declaration made to the son to be admissible in evidence, although it was not communicated to the vendor or to the wharfinger; and that such declaration showed that the bankrupt had not taken possession of the goods as owner, and therefore that the transitus, was not determined. Lord Abinger's dissent to this, was based on the ground that the intention of the bankrupt not having been communicated to the wharfinger, the agency of the latter could not be affected by it, and that the transit was therefore ended; His Lordship considering that the result of the Court's decision would be to protect underhand intentions of bankrupts, and to qualify the acts done by them in making contracts with any person who might receive goods in their names. In the case of *Jackson* v. *Nichol*,[4] the buyers made repeated demands for the goods after the arrival of the vessel, and before stoppage, but the master of the vessel refused delivery, and the Court held that the goods had not come into the possession of the buyer.

That the carrier cannot change his character so as to become the buyer's agent to hold the goods, without the latter's assent, appears from the cases of *Bolton* v. *Lancashire and Yorkshire Ry. Co*,[6] and *ex-parte Barrow*.[7]

[1] *James* v. *Griffin*, 2 M & W, 623 *Whitehead* v *Anderson*, 9 M. W, 518
[2] Blackburn on Sale, 364.
[3] 2 M & W., 623.
[4] 5 Bing. N. C., 508.
[5] 2 M & W. 623
[6] L R, 1 C P, 431; 35 L. J C P., 137.
[7] L R, 6 Ch. D., 783.

And the case of *Whitehead* v. *Anderson*,[1] is an authority for the converse proposition that the buyer cannot compel a carrier to become his bailee to keep the goods, without the latter's assent. And in *ex-parte Cooper in re McLaren*,[2] this principle was expressed by James L. J., as follows:—"When goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser, the transitus is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent. Of course the same principle will apply to a wharehouseman or a wharfinger."

What is the actual delivery to the vendee which ends the transit.—The actual delivery to the vendee or his agent, which puts an end to the transitus, may be, as says Parke B., "at the vendee's own wharehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods;[3] or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself;[4] or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."[5] Lord Abinger in the same case laid down the law to be well settled "that in all cases of the sale and transmission of goods, the transitus is at an end when the property comes, either into the actual possession of the vendee, or, to that place where, by his authority, they are destined to come for his use and to await his orders, where there is nothing further to be done with the goods but to sell them to a customer, or to apply them to his own use; where in effect, there is to be no further change of possession till a change of property takes place, the transit is at an end." As to this see also *G. I. P. Ry. Co.* v. *Hanmandas Ramkison*.[6] The carrier *may*, however, become agent to hold the goods for the buyer, even though he claims to retain them until his lien for freight is satisfied;[7] whether he does in fact become such an agent, is, again, a question of intention; where, however, there is any special agreement between the vendor and purchaser as to the destination of the goods, the transit will, of course continue until the goods have reached that destination.[8]

[1] 9 M. & W., 518. See also *Coventry* v. *Gladstone*, L. R., 6 Eq., 44.

[2] L. R., 11 Ch. D., 68.

[3] *Scott* v. *Pettit*, 3 B. & P., 469. *Rowe* v. *Pickford*, 8 Tsunt., 83.

[4] *Dixon* v. *Baldwin*, 5 East., 175.

[5] *James* v. *Griffin*, 2 M. & W., 633, per Parke, B.

[6] I. L. R., 14 Bom., 57.

[7] See *Allan* v. *Gripper*, 2 Cr. & J., 218, but see *Crawshay* v. *Eades*, 1 B. & C., 181.

[8] *Benjamin on Sale*, 867. *Ex-parte Watson, in re Love*, L. R., 5 Ch. D., 35. *Ex-parte Rosevear, China Clay Company*, L. R., 11 Ch. D., 560, (570). *Bethel* v. *Clark*, L. R., 19 Q. B. D., 553, (559, 560). L. R., 20 Q. B. D., 615.

Vendee may anticipate termination of transit—The vendee, however, may anticipate the termination of the transit, by taking possession of the goods before the destinated place of delivery is reached; this is clear from the remarks of Bowen C. J., in *Kendal* v. *Marshall*[1] "where goods are sold to be sent to a particular destination, the transitus is not at an end until the goods have reached the place named by the vendee to the vendor as their destination. One exception, at least, is to be found to the principle here laid down: the vendee can always anticipate the place of destination, if he can succeed in getting the goods out of the hands of the carrier. In that case, the transit is at an end, whatever may have been said as to the place of destination, and this shows that the real test (when delivery to the vendee is spoken of) is not what is said but what is done."

Part delivery.—But the transit is not terminated by a part delivery of the goods. There have been different expressions of opinion at various times as to whether the delivery of a portion of the goods, the subject of an entire contract, operates as a constructive delivery of the whole, so as to put an end to the right of stopping in transitu. But it has now been settled that the delivery of part operates as a constructive delivery of the whole only when the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole.[2] But it seems that where a purchaser takes part shewing an intention acquiesced in by the carrier, to receive and take possession of the whole, that may be a constructive possession of the whole by the acquiescense of both parties.[3] And in *Kemp* v. *Falk*.[4] Lord Blackburn, in dealing with the question whether the delivery of part is a delivery of the whole, says:—"It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed law, which nobody ever doubted since an elaborate judgment in *Dixon* v. *Yates*[5] by Lord Wensleydale, who was then Parke J. The rule I have always

[1] L. R., 11 Ch. D., (369); see also *Whitehead* v. *Anderson*, 9 M. & W., 518, (534). *Oppenheim* v. *Russell*, 3 B. & P., 54.

[2] *Bolton* v. *Lanchashire and Yorkshire Ry Co*, L. R., 1 C. P., 431, per Willes J.

[3] *Jones* v. *Jones*, 8 M. & W., 431.

[4] L. R, 7 App. Cas, (586).

[5] 5 B. & Ad., 313.

understood, from that time down to the present, to be that the delivery of a part may be delivery of the whole, if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the *onus* is upon those who say that it was so intended."

The right may be defeated by an assignment to a second purchaser whilst the goods are in transit.—Although the right does not cease on the buyer's re-selling the goods, while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf,[1] which proposition is founded on the principle that a second vendee of a chattel cannot stand in a better position than his vendor,[2] yet where the buyer (rightfully[3]) obtains a bill of lading or other document of title to the goods, and assigns it while the goods are in transit to a second buyer, who is acting in good faith, and who gives for them valuable consideration, the right of stopping will be defeated.[4] Although the mere fact that the purchaser of goods has resold them, and that the bill of lading has been made out in the name of the sub-purchaser, does not put an end to the transitus, or destroy the right of the original vendor to stop the goods in transitu.[5] It is, as has been mentioned, further necessary, that the assignment of the bill of lading to be effective against the right of stopping, must be an assignment by the buyer to a second buyer who is *acting in good faith*, thus if such second buyer should be aware that the consignee was insolvent, and then takes the assignment for the purpose of defeating the right to stop in transitu thereby intending to defraud the consignor out of the price, he will be acting *malâ fide*, and will be held to stand in the same situation as the consignee.[6] But the mere fact that the indorsee has notice that the vendor has not been paid, is not sufficient to establish *mala fides*.[7] In *Salomons* v. *Nissen*,[8] the criterion is said to be "does the purchaser take the bill of lading fairly and honestly," or "without notice of such circumstances as rendered the bill of lading not fairly and honestly assignable." But although a bill of lading may have been en-

[1] Ind. Contr. Act, s. 101. *Golding Davis & Co., Ld., in re Knight*, L R, 13 Ch. D., (633), (636).

[2] *Dixon* v. *Yates*, 5 B. & Ad, 313, (339), but see the remarks of Lord Fitzgerald in *Kemp* v. *Falk*, L. R., 7 App Cas., (590).

[3] The word rightfully is not made use of in the Contract Act, but it can hardly be supposed that it was intentionally omitted; it is probable that Courts in India would follow the English law, which holds that the obtaining of the bill, must be rightful, and at all events no Court would be justified in upholding a fraud.

[4] Ind. Contr. Act, s. 102. *Jenkyns* v *Usbourne*, 8 Scott. N. R., 505, (521).

[5] *Golding Davis & Co., Ex-parte, in re Knight*, L. R., 13 Ch. D., 628.

[6] *Cumming* v. *Brown*, 9 East., 514.

[7] *Cumming* v. *Brown*, 9 East., 506

[8] 2 T. R., 674, (681).

dorsed to a *bonâ fide* purchaser, it is as I have pointed out necessary to defeat stoppage that the bill of lading should have come into his possession with the authority of the vendor. If it be stolen from him, or transferred without his authority, a subsequent *bonâ fide* transferee for value cannot make title under it, as against the shipper of the goods.[1] This *dictum* is, however, confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper.[2]

The assignment must be for valuable consideration Past debt.—The assignment to defeat the right of stoppage must be for valuable consideration. It has been held in *Rodger* v. *Comptoir D'Escompte de Paris*,[3] that the forbearance or release of an antecedent claim is not a good consideration for an indorsement of a bill of lading, so as to defeat an unpaid vendor's right of stoppage in transitu; In that case Sir Joseph Napier said:—"Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security, fairly and honestly taken · to the extent to which he has so given value he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex.* Where there is no advance made or value given upon the faith of the documents; where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; where upon the true construction of the assignment, no interest passed that would place the assignee in a better position than the assignor, and the bills of lading which subsequently came to hand were transferred expressly in performance of the agreement in this assignment and without such other consideration whatsoever, it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held to defeat the vendor's claim" But in the *Chartered Bank of India, Australia and China* v. *Henderson*,[4] where A, a certain merchant in London and who had a place of business in Hongkong, purchased goods for shipment from B and paid for them by his acceptances of B's drafts against the shipment, on the terms that A should send them to his firm at Hongkong, and that the proceeds should be remitted to A in bills specially to meet such acceptance. A's firm at Hongkong owed a large sum to the chartered Bank, and were under engagement to secure the debt by depositing shipping documents with him. And being threatened by the Bank, with immediate legal proceedings, they promised the bank that if they would forbear to take such proceedings and would release them from their

[1] *Guerney* v. *Behrend*, 3 El. & Bl., 634 *Shuster* v. *McKellar*, 7 El. & Bl., 722.

[2] *Pease* v *Gloahec*, L. R, 1 P. C, (228)

[3] L. R., 2 P. C., 393.

[4] L. R., 5 P. C., 501.

obligation to deposit shipping documents, they would deposit with the bank bills of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. On the 14th December 1866, the bill of lading of the goods purchased from B, was accordingly endorsed to the bank, which had no knowledge of the terms made with B, and it was returned by the bank, according to agreement, on the receipt of an equivalent sum; Sir Barnes Peacock who delivered the judgment of their Lordships of the Privy Council said:—"The bill of lading having been endorsed to the bank for a valuable consideration and without notice, passed the legal interest in the goods to the bank. Apparently from the statement in the answer, the goods were actually delivered over to the bank, so that the legal interest passed to the bank not only by the delivery of the goods, but by the endorsement of the bill of lading. But even, assuming that the bank did not obtain actual delivery of the goods, there is no doubt that the indorsement of the bill of lading for valuable consideration, passed the legal interest in the goods to the bank. There is a distinction between this case and the one which was cited of *Rodger* v. *Comptoir D'Escompte de Paris*.[1] In that case the question was, whether the goods could be stopped in transitu, and whether the endorsement of the bill of lading prevented the unpaid sellers from stopping the goods in consequence of the insolvency ..... but the present case differs from that case inasmuch as on the 14th December 1866, the bill of lading was in the hands of Lyal Still and Company (the Hongkong branch of A's firm,) and they indorsed and handed it over to the bank for ..... a valuable consideration. ..... Now it must be taken that the consideration for the deposit ..... of the bill of lading was the release .. from the original contract to supply shipping documents of China produce, the substitution of a new agreement, and the abandonment of the threatened legal proceedings. ..... Their Lordships are of opinion that the transfer of the bill of lading in this case was for a valuable consideration. This case differs entirely from *Rodger's* case because the bill of lading in that case was not handed over at the time, but was handed over in pursuance of the agreement generally, to hand over all bills. In this case it was handed over specially at the time in consideration of the release, and of the abandonment of proceedings for not delivering over the shipping documents. It therefore appears that the bank did obtain the legal right to the goods by the indorsement of the bill of lading for a valuable consideration, and whether they afterwards actually received possession of the goods or not, they had a legal title to them, without notice, and that legal title was not applied by the equity arising out of the circumstances under which the goods were sold by B. The effect of their Lordships'

[1] L. R., 2 P. C., 393.

judgment was therefore to decide that the bank by forbearing to sue, and the release from the obligation to deliver shipping documents, gave valuable consideration, and that the legal interest in the goods passed by the indorsement of the bill of lading, and that B could not enforce his claim against the proceeds of sale received by the bank in respect thereof. The view, however, that past consideration was not a good consideration was dissented from in *Leask* v. *Scott*.[1] There, Geen and Company, the consignees of certain goods were indebted to the plaintiffs; on the 1st January, they applied to the plaintiff for a further advance, which he agreed to make on being first covered Geen and Company promised to give him cover (not naming anything in particular) and the plaintiff advanced them a further sum of £2,000, the plaintiff being content with their promise. On the 4th January, the bill of lading of the goods in question consigned by the defendants to Geen and Company, came to the possession of the latter, who on the following day, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turned on the quantity of the property so handed over, nor in any way as to the validity of the transfer It was admitted that the plaintiff was a *bonâ fide* holder of the bill of lading for valuable consideration But the defendants contended that though the plaintiff was such holder effectually as against Geen and Company and their assignees, if they had become bankrupt, or any one claiming through or against them, except the defendant, yet they, the defendants, had not lost their right to stop in transitu and that the right of stopping was available and effectual against every one, except the assignees of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading, that if such consideration were past, it was not such a consideration and that such right was only defeated where there was a transfer for present consideration And in support of this contention relied on *Rodger* v. *Comptoir D'Escompte de Paris*[2] Bramwell J said —"We think that case justifies the argument and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say, that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot, there is not a trace of such a distinction between past and present consideration to be found in the books It is true there is no decision the other way, but wherever the rule is laid down it is laid down without qualification, *viz.*, that a transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the right of stoppage in transitu. It is true no doubt, that opinions must be taken *secundam subjectam materiam*, but it is strange that no Judge, no Counsel, no writer, ever

[1] L. R., 2 Q. B. D., 376. [2] L R, 2 P. C., 393.

guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then, that not only is the case a novelty, but it is a novelty opposed to what may be called the silent authority of all the previous Judges and writers who have dealt with the subject. More than that in *Vertue* v. *Jewell*,[1] where Lord Ellenborough goes out of his way to say that the plaintiff was a transferee for valuable consideration so as to defeat the right of stoppage, he puts it, not on the ground that the consideration was past, as was the fact, but on the ground that the transferee had notice of the transferor's insolvency. Further it is noticeable that this point does not seem to have been mentioned in *Rodger* v. *Comptoir D'Escompte de Paris*, till the reply. Still further, with all respect be it said, the reason given in the judgment is not satisfactory; it is said 'the general rule, so clearly stated and explained by Lord St. Leonards in the case of *Mangles* v. *Dixon*,[2] is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it.' No doubt, but that rule does not apply here. Lord St. Leonards said that with reference to a case where the title was to a chose in action, an equitable title only, or dropping such an expression, a right against a person liable on a contract, and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in *Rodger* v. *Comptoir D'Escompte de Paris*, a title to property in ownership, and to use the old expression, a legal right. If besides dealing with the authorities, we look at the reason of the thing, we are led to the same conclusions, all the arguments of Mr. Justice Buller in *Lickbarrow* v. *Mason*,[3] apply to such a case as the one before as. Practically such a past consideration as is now under discussion, has always a present operation. It stays the hand of the creditor."

The right will not be lost until conditions of the bill of lading are performed.—And further it appears that if the bill of lading contain conditions, every endorsee will take it, subject to such conditions, and will gain no right thereunder until the conditions be performed.[4]

How stoppage made where instrument of title is assigned to secure specific advance.—But where the bill of lading or other instrument of title,[5]

[1] 4 Camp., 31.

[2] 3 H. L. Cas., 702.

[3] 2 T. R., 63, (75).

[4] *Barrow* v. *Coles*, 3 Camp., 92.

[5] As to what are instruments of title. See *G. I. P. Ry. Co.* v. *Hanmandas Ramkison*, I. L. R., 14 Bom., 57, (67), and the English cases of *Gunn* v. *Bolchow*, L. R., 10 Ch., 491. *Kemp* v. *Falk*, L. R., 7 App. Cas., 573 *Bryans* v. *Nix*, 4 M. & W., 775. *Akerman* v. *Humphrey*, 1 C. & P, 53. *McEwan* v. *Smith*, 2 H. L. Cas., 309. *Zwinger* v. *Samuda*, 7 Taunt, 265. *Lucas* v. *Dorrien*, 7 Taunt, 278.

to goods in transit, is assigned by the buyer of such goods by way of pledge to secure an advance made *specifically* upon it, in good faith, the seller cannot stop the goods in transit except on payment or tender to the pledgee of the advance.[1] The goods cannot be retained as a security for a general balance of account, but only for the specific advance made upon the security of the bill of lading. This principle is laid down in *Spalding* v. *Ruding*;[2] but before referring to that case, the previous case of *in re Westzinthus*[3] should be noticed, which case shows that the right is not defeated absolutely by a pledge of the bill of lading, but it remains, subject to a lien for the endorsee's demand. There, Lepage and Company having purchased twenty-three casks of oil from Westzinthus, who drew a bill of exchange on Lepage and Company for the price. This bill and the bill of lading were transmitted to certain agents of Westzinthus with instructions to deliver the bill of lading to Lepage and Company upon their accepting the bill of exchange; the bill was accepted by, and the bill of lading made over to, Lepage and Company. Hardman and Company who were brokers and who were in the habit of making advances in cash and by acceptances to Lepage and Company upon goods placed by them in the hands of Hardman and Company for sale, had previously to the bill of lading of the oil being made over to them, advanced to Lepage and Company upon various goods, all of which were in their possession, £6,700; and they subsequently at the request of Lepage and Company accepted their draft for £1,500 as a further advance upon the goods already in their hands, and also on the 23 casks of oil which had not then arrived: The bill of lading for the oil was thereupon endorsed and made over to Hardman and Company. Subsequently a further advance of £1,000 was made by them to Lepage and Company, a bill of lading of another cargo of oil being endorsed and delivered to them as security. Lepage and Company became bankrupts, and their acceptance of Westzinthus's bill was dishonoured. Subsequently to this the 23 casks of oil arrived, and the agents from Westzinthus thereupon gave notice to the captain of the vessel in which the casks arrived, not to deliver to Lepage and Company, and demanded themselves delivery tendering to the captain the amount of freight, but no tender was made to Hardman and Company of the advances made by them. The captain delivered the oil to Hardman and Company under an indemnity. At the time of the bankruptcy of Lepage and Company, they were indebted to Hardman and Company to the amount of £9,271, who held goods of Lepage and Company which had actually arrived, of which the net proceeds when realized were £9,961, and they also held the bill of lading of the 23 casks of oil of which the net proceeds when sold amounted £831, and the bill of lading of the other cargo of oil which cargo when sold amounted to £1,106, making a total of £11,399. Out of this

[1] Ind. Contr Act, s. 103 [2] 6 Beav., 376. [3] 5 B. & Ad., 817.

sum Hardman and Company paid themselves £9,271 due as aforesaid and deposited £1,437, the amount of the two parcels of oil, to abide the result of an award, and paid over the residue to the assignees of Lepage and Company. The arbitrators appointed to decide the claims on the oil made by Westzinthus and the assignees of Lepage, decided that Westzinthus had by virtue of the demand and attempted stoppage in transitu, a preferable right, either at law or in equity, to the general creditors of Lepage, but allowed him only a proportion of 18 per cent. on the proceeds of his goods, considering that the goods deposited by Lepage with Hardman and Company should be proportionately charged with the payment of the debt due, disallowing the equity claimed by Westzinthus to oblige Hardman to pay himself out of Lepage's own goods. A rule being obtained to set aside the award, Denman C. J., said:— "As Westzinthus would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by the endorsement of the bill of lading for a valuable consideration to Hardman, it appears to us, that in a Court of Equity, such transfer would be treated as a pledge or a mortgage only, and Westzinthus would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage ..... We therefore th nk that Westzinthus by his attempted stoppage in transitu, acquired a right to the goods in equity (subject to Hardman and Company's lien thereon) as against Lepage, and his assignees, who are bound by the same equities that Lepage was. And this view of the case agrees with the opinion of Mr. Justice Buller in his comment on the case of *Snee* v. *Prescott* in *Lickbarrow and Mason*.[1] If, then Westzinthus had an equitable right to the oil, subject to Hardman's lien thereon for his debt, he would by means of his goods, have become a surety to Hardman for Lepage's debt, and would then have a clear equity to oblige Hardman to have recourse against Lepage's own goods, deposited with him to pay his debt in case of the surety; and all the goods of Lepage and Westzinthus having been sold, he would have a right to insist upon the proceeds of Lepage's goods being appropriated, in the first instance, to the payment of the debt." The Contract Act is, however, entirely silent as to this right to have *all* the pledgee's goods appropriated to the discharge of the pledgee's claim before any of the goods comprised within the bill of lading are so applied. In *Spalding* v. *Ruding*,[2] where the plaintiffs were merchants residing at Stralsund, and their agent sold on their behalf to one Thomas a quantity of wheat, the price to be drawn for on Thomas at three months' date payable in London on handing invoice and bill of lading. The plaintiffs shipped the wheat, sent the invoice and bill of lading to Thomas, and drew upon him as agreed. Before the arrival of the vessel carrying the wheat, Thomas, in consideration of the

[1] 6 East., 29 note.

[2] 6 Beav. 376.

acceptance of his draft for £1000 on the cargo by one Ruding, handed the latter the bill of lading and policy of insurance, authorizing him to dispose of the wheat on his (the plaintiff's), account, subject to commission and charges, before the bill became due, or undertaking to provide cash to the amount of the advance, should he (the plaintiff) desire the cargo to be held beyond that time. The cargo arrived, and at about the time of its arrival Thomas stopped payment. The plaintiff's agent therefore gave a verbal notice to the master of the ship, not to part with the wheat without the plaintiff's orders After three days, he again gave notice to the master but being informed that the bill of lading had been endorsed and delivered to Ruding as security for monies lent, he permitted the wheat to be delivered to Ruding, but gave the latter notice that the plaintiffs claimed to be entitled to the wheat and the proceeds thereof, and did not, by removing the stop, abandon their claim, and tendered £1,200 to Ruding Ruding claimed to apply the proceeds of the wheat not only in payment of the bill for £1000 which he had accepted, but also in satisfaction of the general balance of account between himself and Thomas. The Master of the Rolls held, that the plaintiffs had a right to stop the goods in transitu, and although the legal right to the goods was transferred with the bill of lading, yet, in equity, the transfer took effect only to the extent of the consideration paid by the transferee leaving in the plaintiffs an equitable interest in the surplus value The principle laid down in *Spalding* v. *Ruding* and *in re Westzinthus*, have been applied in the case of *ex-parte Golding Davis and Company, in re Knight*,[1] and in *Kemp* v. *Falk*.[2]

Mode of effecting stoppage—The seller may stop the goods either by taking actual possession, or by giving notice of his claim to the carrier or other depositary in whose possession they are.[3] The first of these methods needs no comment, save that such possession may be taken by an authorized agent on the seller's behalf,[4] and that in so doing he may use every lawful and necessary means to that end.[5] The notice referred to, may be either given to the person who has the immediate possession of the goods, or to the principal whose servant has possession, but in the latter case it must be given at such time and under such circumstances, that the principal, by the exercise of reasonable diligence, may be able to communicate it to the servant in time to prevent delivery to the buyer.[6] Lastly the right to stoppage in transitu is not affected

[1] L R., 13 Ch. D, 628.

[2] L R., 7 App. Cas, 573.

[3] Ind. Contr. Act, s 104 *The Tigress*, 32 L J Adm, 97 *Litt* v. *Cowley*, 7 Taunt, 169.

[4] *Coombe's Case*, 9 Co., 75, *b*. *Bohtlingk* v. *Inglis*, 3 East, 381.

[5] Ind Contr. Act, s 188

[6] Ind. Contr. Act, s. 105. *G. I. P. Ry Co.* v. *Hanmandas Ramkisson*, I L. R., 14 Bom, (65) *Whitehead* v. *Anderson*, 9 M & W, 518, per Parke B *Litt* v *Cowley*, 7 Taunt, 169. *Kemp* v. *Falk*, L. R., 7 App. Cas, (585), per Lord Blackburn.

by the Bills of Lading Act of 1856;[1] nor will the effect of stoppage be to put an end to the contract.[2]

PART II. RIGHT TO INDEMNITY.

The agent's right to be indemnified and compensated.—Upon general principles, an agent is entitled to indemnity from his principal against liabilities incurred by him in executing the orders of his principal,[3] unless those order are illegal, or unless the liabilities are incurred in respect of some illegal act of the agent himself, or by reason of his default.[3] This rule is in accordance with the civil law "officium nemini debet esse damnosum" (Ins. Lib. 56, para. 4), and is laid down in the Indian Contract Act,[4] as follows:—

1. That an agent is entitled to be indemnified by his principal against the consequences of all *lawful* acts[5] done by him in exercise of the authority conferred.

2. That an agent is entitled to be indemnified by his principal against the consequences of acts done in good faith, even though such acts cause injury to the rights of third persons; but the principal will not be liable to indemnify the agent against the consequences of an act which is criminal, which he may have employed the agent to carry out.

3. That the agent is entitled to be compensated by his principal in respect of injury caused to him by the principal's neglect or want of skill.

Right to indemnity against lawful acts.—Under this heading fall cases in which the agent has defended suits on behalf of his principal, and has been put to costs, charges and expenses therefor; or where he has on behalf of the principal properly made advances or incurred expenses in the business of the agency;[6] or expenses incurred for wharehousing duty, freight, lighterage, porterage, general average, salvage, repairs, travelling expenses, and for other acts done to preserve the property of his principal; in all such cases he is entitled to recover against the principal expenses or advances so made.[7]

Requisites entitling agent to recover from his principal.—In order to entitle an agent to recover from his principal, under such circumstances, he must show, first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority; and thirdly, that the fault was not attri-

[1] Act IX of 1856.

[2] Ind Contr. Act, s 106. See also *Hodyson* v *Loy*, 7 T R, 445 *Clay* v *Harrison*, 10 B & C., 99. *Stephens* v. *Wilkinson*, 2 B. & Ad., 323.

[3] *Thacker* v *Hardy*, L. R., 4 Q B D, 635,

[4] Ind Contr Act, ss 222, 223, 224, 225

[5] *See Ma Wine* v *Burn*, 4 W R, (R R), 1

[6] *Betts* v. *Arbuthnott & Co*, 19 W. R. P. C., 65.

[7] See Story, 335, 336. 1 Rolls. Abrid., 124, 7.

butable to any fault or laches on his part. Thus where an agent defended on account of his principal a suit brought on breach of contract to deliver, which suit was decreed in full in favour of the plaintiff; the agent was held entitled to recover the amount of damages sustained by him in defending such suit.[1] So where a principal sent his factor abroad and commissioned him to draw on foreign merchants, which he did, and so stated in the account which he furnished to his principal, and the principal gave credit for the bills drawn, as for cash, but by his contrivance the bills were not accepted; it was held that the factor could not be concluded by his account, and was entitled to be paid.[2] So where an auctioneer had under authority sold an estate, the title of which was objected to, and refusing to return the deposit, was sued to compel him so to do, whereupon he after notice to his principal to defend the suit, which the latter refused to do, repaid the deposit and paid all costs of the suit which had been incurred, together with the costs of his own attorney and the duties on the sale, and sued his principal to recover the expenses so incurred by him: it was held that he was entitled to recover the moneys paid on all other accounts than those of costs, as to recover costs there should have been a special count, and there being no such count the plaintiff could not recover costs under the action as framed which was one for paid only. But there is little doubt that he would have been entitled to recover all the costs also, had the action been rightly framed.[3] So where a merchant in London sold, on commission for a merchant in Sweden, three cargoes of timber to arrive, and the Swedish merchant drew on the London merchant a bill of exchange for part of the produce. The Swedish merchant then consigned two of the cargoes to H. and Company of London, directing them to deliver to the London merchant the bills of lading, on the latter making acknowledgments (which the Swedish merchant had no right to require) and on accepting a bill of exchange for the remaining produce of the three cargoes according to the account sale made out by the Swedish merchant. The London merchant gave a notice to H. and Company that he claimed the bills of lading without performing any part of the conditions, and on a subsequent occasion obtained possession of the bills of lading on the understanding that he would perform the conditions, and although he did not give the required acknowlegment he accepted the bill, which H. and Company negotiated, and paid over the proceeds to the Sweedish merchant—held, in a suit instituted by the London merchant against H. and Company and the Sweedish merchant, that H. and Company were bound by the notice of the London merchant's rights, who was entitled to be re-imbursed by H. and Company to the extent of the money received on the bill, the monies paid by him for or in respect of the three

[1] *Frixione* v. *Tagliaferro*, 10 Moo P. C., 175, (196).

[2] *Warr* v. *Praed*, Colles P. C., 57.

[3] *Spurrier* v. *Elderton*, 5 Esp., 1.

cargoes, so far as these sums were not covered by the proceeds of the two cargoes received.[1] So in *Brittain* v. *Lloyd*,[2] where an auctioneer was employed by a dealer to sell an estate by auction, which was bought in at the sale, and the Commissioner of Excise refused to remit the duty thereon, and ultimately compelled the auctioneer to pay it, held, that he might recover the duty from his employer in an action for money lent which is maintainable in every case in which there has been a payment of money by the plaintiff to a third party, at the request of the defendant, with an undertaking, express or implied, to repay the amount, and it is immaterial whether the defendant is relieved from a liability, by the payment, or not. It is however as yet undecided, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him, including the amount of an accommodation bill drawn by the principal, and accepted by such agent."[3]

The agent will be entitled to be indemnified for payments made by him in accordance with the custom of particular markets.—In *Bayley* v. *Wilkins*,[4] the defendant ordered the plaintiff a stock-broker to purchase for him 20 shares in a certain railway at a certain price, which the plaintiff did accordingly. The defendant paid the amount with commission and the transfer was made. Before the sale a call had been made, but was not then due, and no mention was made of it. Immediately after the sale the vendor paid up the call, though not then due, which it was necessary under 8 and 9 Vic. c. 16, s. 6 to do in order to make the transfer. The plaintiff pursuant to a rule of the Stock Exchange paid the amount of the call over to the vendor:—*held*, that the defendaut in employing a broker on the Stock Exchange, must be taken to have contemplated that which was the rule of the Stock Exchange, and that the plaintiff was entitled to recover from the defendant the amount paid over in an action for money paid to the defendant's use. So where the custom of a particular market compelled an agent, who had contracted under instructions from his principal for the purchase of shares of a certain Company, to pay the price of the shares to the person from whom he had bought them, the agent was held entitled to recover such sums from the principal, (although the contract could not be completed by transfer before the winding of the Company), as at the time the payment was made, the contract had not been ascertained to be void under s. 153 of the English Companies Act under 1862 (s. 197 of Act VI of 1882).[5] So also where a sharebroker was employed to buy shares on a particular market

[1] *Dresser* v. *Hoare*, 2 Jur. N S., 1151. 26 L. J. Ch., 51.

[2] 15 L. J. Ex., 43

[3] *Hood* v. *Stallybrass*, L. R, 3 App. Cas., 880, 38 L. T., 826.

[4] 18 L J. C. P., 273.

[5] *Whitehead* v. *Izod*, *Chapman* v *Shepherd*, L. R., 2 C. P., 228. See also *Seth Mull* v. *Choga Mull*, I. L. R, 5 Calc., 421.

where the usage was, that where a purchaser did not pay for his shares within a given time, the vendor, giving the purchaser notice, might re-sell and charge him with the difference on a re-sale; and the broker acting under authority bought at such market in his own name and was compelled to pay a difference on the shares, through the neglect of the principal to supply funds, it was held that he might sue his principal for the money so paid.[1] For further cases on this point, relating to the right to indemnity for payments made in accordance with the rules of the Stock Exchange see the cases collected in Campbell on Sale and Agency, pp. 442-448.

Agent acting without default incurring losses is entitled to be indemnified.—Further if an agent has, without his own default incurred losses or damages in the course of the business of the agency, or in following out the instructions of his principal, he will be entitled to be compensated therefor; but yet it is not every loss or damage for which the agent will be entitled to reimbursement from the principal, for the principal is only liable for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency.[2] Thus in *Duncan* v. *Hill*,[3] the plaintiff's brokers on the London Stock Exchange bought for the defendant certain shares for the account of the 15th July 1870, and on that day by his instructions carried them over to the account of the 29th July, and paid differences amounting to £1,688. The defendant and various others, principals of the plaintiff, not having paid the amount due from them in respect of the contract of the 15th July, the plaintiffs became defaulters and in conformity with the rules of the Stock Exchange, they were declared defaulters and their transaction closed. On the closing of the account a further sum became due from them in respect of differences upon the contracts carried over by them for the defendant. The plaintiffs paid a dividend of 6s. 6d. in the pound and a further dividend was expected. A suit was brought in the name of the plaintiffs, but for the benefit of their creditors, to recover the sum of £6,013, which included the £1,688 as well as the sum which the defendants became liable to pay upon their being declared defaulters, *held* that the defendants were not liable for anything beyond the £1,688, there being no implied promise by a principal to his agent to indemnify him for loss caused, not by reason of his having entered into contracts which he was authorized to enter into by the principal, but by reason of his own insolvency. Blackburn J., said: "There was no failure by the defendants in any part of their undertakings, there was no evidence that the insolvency of the plaintiffs was occasioned by reason of their having entered into contracts for the defendants, it is consistent with the evidence that the plaintiffs could have become insolvent precisely at the same time as they

[1] *Pollock* v. *Stables*, 12 Q. B., 765. [2] Story, 339, 341. [3] L. R., 8 Ex., 242.

did if they had not entered into any contract for either of the defendants. The plaintiff's insolvency was, so far as regards the defendants, entirely the result of their own default." Where, however, the loss which the agent has incurred has arisen by his own default, *e. g.*, by reason of his insolvency, and not by reason of his having entered into contracts which he has been authorized to enter into, there is no promise which can be implied on the part of his principal to indemnify him.[1]

Indemnity for loss from imprudent acts done within the authority.—The agent has moreover a right to be indemnified against the consequence of even imprudent acts done, within the authority conferred, and without neglect and fraud on his part. Thus in *Overend Guerney* v. *Gibb*,[2] where certain directors were authorized, under the Articles of Association of the Company incorporated for the purpose, to purchase and acquire, under certain stipulations as to guarantee or otherwise as might be agreed upon, the business of Overend and Guerney and Company as it then stood; and the directors purchased the whole business including all the assets and liabilities, taking as a guarantee of the value of the assets a security which the Court subsequently found sufficient; no charge of any fraudulent character was made against the directors, or of any breach of duty, or of any negligence, or of their not having done honestly what they considered to be their duty towards the Company; but they were sued by the Company and sought to be made liable for all the loss which was sustained in consequence of the failure of the Company a short time after it was incorporated, on the allegation that they were trustees for the Company, and that in purchasing the business they did an act so improvident and imprudent that it amounted to *crassa negligentia* and consequently to a breach of trust; Lord Chelmsford in giving judgment on the case, said:—"They (the directors) did it (purchased), it is admitted honestly and fairly, and believing that they were doing it in discharge of their duty, and it seems to me to be a very strong and unusual thing for a suit to be now instituted to make the directors liable for the loss which has occurred under these circumstances. In fact, it amounts to this; an agent (because these directors are really more in the character of agents than of trustees, they are mandatories), an agent being authorized to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorized to be done, is when the loss is occasioned by his having done the act, to be made liable for it. That certainly is rather a startling proposition, and one which it would require a great deal of argument to lead me to adopt."

No indemnity where the agent is unskilful.—It has, however, been held that although an agent is entitled to be indemnified against the conse-

[1] *Duncan* v. *Hill*, L. R., 8 Ex., 242.

[2] L. R., 5 H. L., 494.

quences of his lawful acts, yet, if he is a paid agent, and conducts himself with such unskilfulness as to incur unnecessary expenses, he cannot recover from his principal; thus in *Capp* v. *Topham*,[1] where an auctioneer was employed to sell an estate, and on being asked by the solicitor of his principal whether he had taken proper precautions to avoid payment of certain duties payable under Statute in the case of the property being bought in, and having replied in the affirmative; and it afterwards turned out that he was liable to pay such duties, and he on compulsion did so, and sued his principal for the amount, the agent was held not to be entitled to recover, he having warranted that proper precautions had been taken to prevent the duty attaching in the event of there being no sale, though both parties were mistaken in the law. But it has been held by Wilde C. J. and Maule J., that where an agent compromises an action which he might have defended with some chance of success, but uses his best discretion in acting as he did, he may require his principal to indemnify him for the amount he has paid,[2] but this appears to have been dissented from by Crosswell J.

No indemnity for voluntary advances.—Where an agent makes a voluntary or officious payment, though for the benefit of his principal, he will not be entitled to be indemnified therefor.[3] Thus where goods were shipped under a bill of lading which stated that freight had been paid, and this bill of lading was endorsed over for value to the plaintiff by one Wylie, who endorsed it over to the defendants, for the purpose of making a sale of the goods, which the defendants did at public auction, and when called upon by the purchasers to make delivery, found that the goods had been stopped for freight, which had not as it turned out been paid as stated in the bill of lading. The defendants in order to get the goods, paid the freight, delivered the goods and received the price, but in accounting to the plaintiff claimed to retain the amount paid by them as freight; held by Lord Tenterden that the defendants had made the payment in their own wrong, and were not entitled to make the deduction.[4]

Indemnity for payments without special instruction, but adopted.—In *Sentance* v. *Hawley*,[5] the plaintiff a broker bought for the defendant three lots of sugars numbered 67, 68, and 69, the prompt day being the 20th July; by the terms of sale payment was either to be made by cash on the 20th July, by acceptance at seventy-one days from May the 14th, or on delivery

[1] 6 East, 392. See also Rolls Abr, 125, pl. 10.

[2] *Pettman* v. *Keble*, 19 L. J. C. P., 327

[3] *Edmiston* v. *Wright*, 1 Camp., 87, 88.

[4] *Howard* v. *Tucker*, 1 B & Ad., 712 See also *Child* v. *Morley*, 8 T. R, 610, (613). *Stokes* v. *Lewis*, 8 T R., 20

[5] 13 C. B. N. S., 458.

of the warrants. On the 25th May the plaintiff, according to the usage of trade, at the request of the defendant, paid the price of lot 67, and obtained for it a warrant and cleared it at the custom house. He, at the same time, but without special instructions from the defendant, paid the price of lots 68 and 69 and obtained warrants for the same. The defendant not only knew that this was a common practice amongst brokers, and that the plaintiff had acted in a similar manner in similar sales made on his behalf by the plaintiff, but he was informed by a clerk of the plaintiffs that these lots had been paid for; on the 22nd June, the defendant sent instructions to the plaintiff to clear lot 68. On the same day but before those instructions could in the usual course of business be acted upon, a fire broke out at the wharehouse and the sugars were destroyed The Court held that the plaintiff was entitled to recover the payment made by him on account of lot 68, on the ground that the defendant had adopted by his order of the 22nd June, the payment already made by the plaintiff[1] So in *Cornwal* v *Wilson*,[2] the defendant a merchant in London sent orders to the plaintiffs, merchants in Riga, as his factors to buy some hemp at a limited price, the plaintiffs exceeded the limit by £25, but saved a sum in freight exceeding the loss in price, and the defendant refused to accept the hemp on arrival in London, yet, although expressly by letter refusing the contract, shipped the goods on a new risk instead of disposing of them in London: and in a suit brought by the plaintiff, to recover his commission charges and expenses, sought to prove a custom whereby he became the factor of his factor; the Court held that the acts of the defendant after the arrival of the goods, were not the acts of a factor, and that it was clear from the manner in which he acted, that he desired to have the goods at a lower price, and meant to take them as his own notwithstanding what he said, and that he must by his acts be held to have waived the right of disowning the contract, and must account to the plaintiff according to the price he paid.

Where there is a special contract, which is in itself ultra vires, if the principal adopts the contract he must indemnify the agent against its burdens—Where an agent on behalf of his principal makes a special contract, in itself *ultra vires*, in order to fulfil which he incurs special expenses; if the principal adopts the benefit of that contract, he must in equity also bear its burdens; thus where a master of an ordinary seeking ship entered into a charter-party, under seal, to carry troops from Mauritius to England, and stipulated that he would make certain alterations in the ship, in order to enable him to carry the troops, and at the Cape of Good Hope, entered into another charter-

[1] As to adoption of acts done by agent for which act agent is entitled to be indemnified See *Hartas* v. *Ribbons*, L. R., 22 Q. B. D., 254

[2] 1 Ves., 509.

party, not under seal, to a similar effect, and made the specified alterations and paid money and drew bills to meet the expenses necessary to the making of the alterations, and the voyage was performed; held that although the master had no lien for expenditure made in the ordinary discharge of his duties as master, yet in equity he was entitled out of the freight earned to be paid the advance made and to be indemnified against the bills.[1] This decision was approved in *Seymour* v. *Bridge*.[2]

Indemnity must be for a legal act.—The transactions out of which the payments, expenses, advances or charges, made by an agent arise, must, however, be of a *legal nature*. In *Josephs* v. *Pebrer*,[3] the defendant had employed the plaintiff a broker to purchase ten shares in an Association called the "Equitable Loan Bank Company." The shares had not at that time been distributed, and the plaintiff was to buy them for the coming out. It appeared that the Company professed to have a capital of £2,000,000 in shares of £50 each; that a deposit of one pound per share was required on delivery of certificates for shares, and the shares were to be transferable without any restriction, and the holders were to be subject to such regulations as might be contained in any Act of Parliament passed for the Government of the Society, and in the meantime to such regulations as might be made by a committee of management. No evidence was given as to the particular objects or tendency of the Company; on this evidence it was held that the Company was illegal and within the operation of Geo. I. c. 11, c. 18, as having transferable shares, and affecting to act as a body Corporate without authority by charter or Act of Parliament; and that the plaintiff, who had sued the defendant for not accepting and paying for the shares bought for his account and under his directions, could not maintain his action for money paid to the use of the defendant as it arose out of an illegal transaction. And even an express promise of indemnity to the agent against that which he knows to be contrary to law will not avail the agent.[4] A distinction, however, must be made between payments on contracts which are illegal, and on those which are declared by Statute to be unenforceable by law. Thus in *Read* v. *Anderson*,[5] where an agent was authorized to make a bet in his own name on behalf of his principal, and having done so, and the bet being lost, paid it to the winner, and sued his principal to recover the advance so made; he was held to be entitled to recover; it being held that the act of wagering was not unlawful under 8 and 9 Vic. c. 109, section 18 of which enacted

[1] *Bristow* v. *Whitemore*, 9 H. L. Cas., 391.

[2] L. R., 14 Q. B. D., 460.

[3] 3 B. & C., 639. See also *Allkins* v. *Jupe*, L. R., 2 C. P D., 375.

[4] *Martyn* v. *Blithman*, Yelv., 197.

[5] L. R., 10 Q. B. D., 105.

that "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager"; and that there was nothing in that section to affect the legality of wagering contracts, under which they were simply rendered null and void and not enforceable by any process of law. That the act of wagering was not unlawful, although the law would not assist the winner in enforcing payment of it, but although the law would not compel the loser of a bet to pay it, he might lawfully do so if he chose, and what he might lawfully do himself he might lawfully authorize another to do on his behalf, and if by his request or authority another person paid the bet so lost, the amount so paid could be recovered from him as so much money paid to his use.

Where the agent is employed to do a legal act which in the ordinary course of things will involve him in pecuniary obligations, a contract to indemnify is implied—In the case last cited the agent being authorized to make the bets paid them over to the winners, and had he not done so, he would have been "a defaulter," and would have become liable to certain disqualifications the consequences of which would have been very serious to him in his employment as a betting Commission agent. As to this part of the case Hawkins J. stated, "The plaintiff's case may also, as it seems to me, be supported on this ground, that if one man employs another to do a legal act, which in the ordinary course of things will involve the agent in obligations pecuniary or otherwise, a contract on the part of the employer to indemnify his agent is implied in law. See Story on Agency, ss. 337—340; and I think, it signifies nothing that such obligation is not enforceable in a Court of Justice if the non-fulfilment of it would entail serious consequences or loss upon the agent, for he is not bound to submit to these things for his employer, if, by so doing that which was in contemplation of both at the time of the employment, he can avoid them, as he can, in the case of bets lost, by paying them, and he is not bound in my opinion to incur the odium and consequences of repudiating his honourable engagements." The case went up to the Court of Appeal and the judgment of Hawkins J. was affirmed,[1] the main question there being, as it was also in the lower Court, as to whether the authority given to the agent was revokable or not. The case of *Read* v *Anderson* was followed in *Seymour* v. *Bridge*,[1] a decision as to the effect of Leeman's Act, 30 & 31 Vic., ch. 29, s. 1, on the right of the agent to be indemnified; but see also *Perry* v. *Barnett*,[2] where *Read* v. *Anderson* was distinguished. Similarly in *Tribhuvandas Jagjivandas* v. *Motilal Ramdas*,[3] it has been held that an agent employed to effect a wager is entitled to recover from his principal money paid on his account in respect thereof, his

[1] L. R., 14 Q. B. D., 460 [2] L. R., 14 Q. B. D., 467. [3] 1 Bom. H. C., 34.

authority not having been revoked; and that the claim was not affected by Act XXI of 1848. So where a broker was employed by the defendant to speculate for him on the Stock Exchange, with the knowledge that the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the broker would arrange matters so that nothing but differences could be payable by the principal. The broker accordingly entered into contracts on behalf of the defendant upon which the latter became personally liable; and he (the plaintiff) sued the defendant for indemnity against the liability incurred by him and for commission as broker; held, that he was entitled to recover, for the employment of the plaintiff by the defendant was not against public policy and was not illegal, and further were not in the nature of a gaming and wagering contracts.[1] Lindley J., in delivering judgment in considering whether the transaction was null and void under 8 and 9 Vic. c. 109, s. 18 said, "This Act does not expressly allude to Stock Exchange transactions; but it has been decided that agreements, between buyers and sellers of shares and stocks, to pay or receive the differences between their prices on one day and their prices on another day, are gaming and wagering transactions within the meaning of the Statute, *Grizewood* v. *Blane*,[2] *Barry* v. *Croskey*,[3] *Cooper* v. *Neil*,[4] all decide that. But the plaintiff did not agree to buy or sell from or to the defendant; and I have the authority of Brett L. J., for saying that the Statute only affects contract which makes the bet or wager. ..... Now if gaming and wagering were illegal, I should be of opinion that the illegality of the transactions in which the plaintiff and the defendant were engaged would have tainted, as between themselves, whatever the plaintiff had done in furtherance of their illegal designs, and would have precluded him from claiming in a Court of law any indemnity from the defendant in respect of the liabilities he had incurred. ..... But it has been held that although gaming and wagering contracts cannot be enforced, they are not illegal. *Fitch* v. *Jones*[5] is clear to that effect. ..... Having regard to these decisions,[6] I cannot hold that the Statute precludes the plaintiff from maintaining the action. ..... In answer to the argument that a contract cannot be made the foundation of an implied promise to indemnify, it appears to me

[1] *Thacker* v. *Hardy*, L. R., 4 Q. B. D, 685 followed in *Ex-parte Rogers*, L. B., 15 Ch. D., (214).

[2] 11 C. B., 526.

[3] 2 J. & H., 1.

[4] W. N., 1st of June, 1878.

[5] 5 E & B., 238.

[6] *Knight* v. *Camber*, 15 C. B., 562; *Jossoph* v. *Lutwyche*, 10 Ex., 614. *Rosewarne* v. *Billing*, 15 C. B. N. S., 316.

sufficient to say that an obligation to indemnify is created whenever one person employs another to do a lawful act which exposes him to liability, and that, in my view of the evidence, the defendant did authorize the plaintiff to incur liability by buying and selling as above described. I am unable to draw the inference which the jury drew in *Cooper* v. *Neil*, namely, that the plaintiff was instructed to make time bargains. A real time bargain is, I suspect, a very rare occurrence, *Grizewood* v. *Blane* ..... affords an instance of one. But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first a bargain to buy or sell, and secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain is entered into" Bramwell L J., on appeal said as to time bargains, "A time bargain is not necessarily invalid; there may be a good contract to sell next year's crop of the apple trees growing in a specified orchard, and what is this but a time bargain" But if the term "time bargain" is understood to mean an agreement to pay the difference between the price at the time when the bargain is made and the price at a subsequent time, that agreement is perhaps in the nature of a wager, but it is not "a time bargain" in the ordinary sense of the word." Brett L J., in remarking on *Grizewood* v. *Blane*, said: "I need only say that upon the findings the judgment may be right; but the jury probably misunderstood the nature of the evidence before them."

Advances made after revocation of the authority.—The question whether or no an agent is entitled to be indemnified for advances made by him after revocation of the authority to advance, appears to depend on the fact whether or no the order to pay amounts to an appropriation. Where an advance or payment is made by an agent at the order of his principal contained in an agreement, amounting to an appropriation of specific property, he will be able to claim an indemnity from his principal from the advance made, notwithstanding that the principal has countermanded the order subsequently to the agreement under which the advances is made.[1] But where an agent has received an order from his principal to make a payment to a third person, but before the payment is made the principal countermands the order, the agent, if he makes the payment does so at his own risk.[2] So also where a customer directed his bankers to hold a certain sum of money from his private account at the disposal of a third person, and the banker accepted the order, and before actual appropriation or payment was made by the banker, the principal countermanded the order, but nevertheless the banker made payment to such third person, he was held to be

[1] *Fisher* v. *Miller*, 7 Moo. 527; 1 Bing., 150.

[2] *Fisher* v. *Miller*, 7 Moo. 527; 1 Bing., 150.

liable.[1] And here it may be added, that there seems to be no distinction between an actual payment made by an agent in the exercise of the power conferred upon him, and a liability to pay incurred by him; he is equally in either case entitled to be indemnified against the consequences of any lawful act done by him.[2]

Indemnity for act done in good faith though to injury of third person.—Where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it causes injury to the rights of third persons.[3] This principle on which an implication of an indemnity arises, is laid down in *Toplis* v *Grane*,[4] there the defendant an attorney on behalf of his client authorized the plaintiffs who were brokers to distrain certain goods on the premises of A for rent due, whereupon the distress was made. Some of the goods being privileged from distress and claimed by certain persons alleging themselves to be the true owners, the plaintiffs required an indemnity, which the defendant gave on behalf of his client, and afterwards said he would give a further guarantee. The owners of the privileged goods having sued and recovered against the plaintiffs, the latter sued for an indemnity against the costs, charges and expenses incurred. Tindal C. J., said:—"We think, that the defendant by his conduct throughout the whole transaction caused the plaintiffs to believe that they were acting under an indemnity from him, and that such indemnity therefore, may be justly inferred to have been given ..... And we think the evidence brings the case before us within the principle laid down by the Court of Queen's Bench in *Betts* v. *Gibbins*,[5] that where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the right of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof." Judgment was given for the plaintiffs. So in *Johnston* v. *Usborne*,[6] where the defendant a corn merchant in Ireland, sent written instructions to the plaintiff a corn-factor his *del credere* agent, to sell oats of a certain quality at a certain price on his, the defendant's, account, and the oats sold proved to be of inferior quality, and by reason thereof the plaintiff was obliged to pay to the vendee a difference in value, it was held that he was entitled to recover the difference from the defendant. So in *Adamson* v. *Jarvis*,[7] the defendant having cattle of great value in his possession represented to the plaintiff, an auctioneer, that he had authority to dispose of such property,

[1] *Gibson* v *Minet*, 2 Bing 7; 9 Moo., 31; 1 C. & P., 247.
[2] *Lacey* v *Hill*, L R, 18 Eq, 182, (191)
[3] Ind. Contr. Act, s. 223.
[4] 5 Bing. N. C., 636
[5] 2 A & E., 57.
[6] 11 A. & E., 549
[7] 4 Bing, 66.

and requested the plaintiff to sell the cattle for him. The plaintiff believing the representation to be true, and not knowing either at the time, or at any time after the representation was made, that the cattle did not belong to the defendant, sold them and paid the proceeds over to the defendant. Subsequently the true owner of the cattle so sold, obliged the plaintiff to pay damages and costs. The defendant then refused to make good to the plaintiff the amount paid by him, and the plaintiff sued him for the recovery of the same. Best C. J. said;—the case was to be governed by the principle which regulates all laws of principal and agent, *viz.*, that "every man who employs another to do an act which the employer appears to have a right to authorize him to do, undertakes to indemnify him for all such acts as would be *lawful*, if the employer had the authority he pretends to have. A contrary doctrine would create great alarm, auctioneers, brokers, factors and agents, do not take regular indemnities. These would be, indeed surprised, if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrong-doers, and could not recover compensation from him who had induced them to do the wrong." The case was decided in favour of the plaintiff.

Principle that wrong-doers cannot have redress against each other, explained—It was in the case last cited contended that there could be no indemnity between wrong-doers; and this no doubt is so;[1] but the Court held that the rule that wrong-doers cannot have redress for contribution against each other is confined to cases *whether the person seeking redress must be presumed to have known that he was doing an unlawful act.* Thus in *Betts* v. *Gibbons*,[2] where the defendant consigned to the plaintiffs ten casks of acetate of lime for N and W, two of which casks were delivered, but the remaining eight continued in the plaintiff's hands up to the time of the bankruptcy of N and W; on which the plaintiffs, by the defendant's orders, refused to deliver them to the assignees of N and W, and at the request of the defendant delivered them to some other persons. The assignees of N and W brought an action against the plaintiffs in trover for the eight casks. The plaintiffs then wrote to the defendants stating that they looked to him for an indemnity, and enquiring whether they should defend, stating that they should settle the action in default of their receiving instructions. After some negotiations the plaintiffs paid the sum claimed against them by the assignees with costs, and sued the defendant declaiming upon a promise to indemnify, for the sum so paid by them. Taunton J., said:—"The principle laid down in *Merryweather* v. *Nixan*,[3] is too plain to

[1] *Wilson* v. *Milner*, 2 Camp., 452. *Pearson* v. *Skelton*, 1 M. & W. 504. *Merryweather* v. *Nixan*, 8 T. R., 186. 2 Sm. L. C., 569 *Farebrother* v. *Ansley*, 1 Camp., 343.

[2] 2 A. & E., 57.

[3] 8 T. R., 186.

be mistaken, the law will not imply an indemnity between wrong-doers. But the case is altered when the matter is indifferent in itself, and where it turns upon circumstances, whether the act be wrong or not. The act done here, by changing the destination of the goods at the order of the defendant, was not clearly illegal, and therefore, was not within the rule of *Merryweather* v. *Nixan*." Thus the rule as to indemnity is again exemplified in *Dixon* v. *Faucus*,[1] where the defendant gave an order to the plaintiff to make a quantity of bricks and to impress them with a mark which the defendant knew, but the plaintiff did not know, to be the trade-mark of one Ramsay. The bricks were made according to the order, and thereupon Ramsay commenced a suit against the plaintiff for an injunction, who, after incurring expenses about the defence to the suit, compromised that matter by paying Ramsay a certain amount, and then brought an action to recover that amount and the expenses so incurred, *held*, that the action was maintainable. So in *Humphreys* v. *Pratt*,[2] where a sheriff upon the representation of a plaintiff in a suit seized certain goods under a *fi fa* as belonging to the defendant in that suit, and the goods were claimed by one John Power, a son of the defendant in the suit mentioned, and John Power subsequently brought an action against the sheriff and recovered against him damages and costs, the sheriff then brought an action against the person directing him to seize the cattle, and who had represented them to be the property of this judgment-debtor. Lord Tenterden is said (though the judgment is not set out) to have held that an indemnity to the sheriff might be implied on the ground, that the sheriff was a public officer and was placed between two fires.[3] In the cases of *Adamson* v. *Jarvis*, *Humphreys* v. *Pratt*, *Betts* v. *Gibbins*, *Toplis* v. *Grane*, above cited, it appears that the fact of agency was not *relied on*:—These cases are all referred to in *Dugdale* v. *Lovering*,[4] which points out that the principle upon which in such cases a contract of indemnity is implied, is not confined to cases of principal and agent or employer and employed; and that in the cases of *Adamson* v. *Jarvis* and *Humphreys* v. *Pratt*, the implication is not made to rest on the fact of the plaintiffs being an agent, or on notice of the third party's claim, but merely on the fact of the plaintiff having done an act at the request of the defendant which was not manifestly illegal or tortious to his knowledge, but which exposed him to an action. That the sheriff is the agent, in such cases, for the judgment-creditor, may be inferred from an expression of opinion of their Lordships of the Privy Council in *Dorab Ally Khan* v. *Khajah Moheeoddeen*.[5] However in *Morris* v. *Salberg*,[6] Fry L. J,

[1] 30 L. J Q B, 137. See 2 Sm. L. C., 172.

[2] 5 Bly. N. S, 154.

[3] See *Collins* v *Evans*, 5 Q B, 820, (829), for a supposed reason for the decision in the case.

[4] L. R., 10 C. P., 196.

[5] I. L R., 3 Calc., 806, on appeal from I. L R., 1 Calc, 55

[6] L. R., 22 Q. B. D., 614, (622).

has said, that the true view appears to be that any previous direction of the execution-creditor to the sheriff may make the sheriff his servant for the purpose of seizing the goods, and that an endorsement on the writ by him or his agent may amount to such a direction; and I think it may be gathered from the judgment in this case, that if no direction is given to the sheriff, the sheriff when acting under a valid writ, does so by the command of the Court and as the servant of the Crown and not of the execution creditor.

No indemnity for criminal act.—If the act which the agent is employed to do, is *criminal*, he will be unable to call upon his principal for an indemnity, even though the latter may have expressly or impliedly promised to indemnify him against the consequences of such act[1] "I know of no case," said Lord Lindhurst C. B., in *Colburn* v *Patmore*,[2] "in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime. It is not necessary to give any opinion upon this point; but I may say, that I entertain little doubt that a person who is declared by law to be guilty of a crime cannot be allowed to recover damages against another who has participated in its commission." This opinion expressed by Lord Lindhurst, has, in *Shackell* v. *Rosier*,[3] since been confirmed; there at the request of the defendant, the plaintiff and another person, the proprietor and publishers of a certain newspaper, published a statement in their newspaper which was libellous. The person libelled thereupon brought an action against the plaintiffs; and the defendant, whilst the action was pending, in consideration that the plaintiffs should defend the action, promised to save harmless and indemnify them from, and reimburse them all payments of, damages, costs, charges and expenses which they should or might incur, bear, pay, sustain or be liable for, by reason of their publishing the statement and of their defending the action. The action was compromised and the plaintiff incurred expenses and costs; he thereupon sued the defendant to recover the amount so paid. Tindal C. J., said:—"Even if it were not so," (*i. e.*, the promise being illegal and void) "I should say it is far too extensive to be legal; for it is not confined to indemnifying the plaintiff in the action for libel, but from costs and *consequences*. What is that but to indemnify him against all the consequences of his crime, costs, damages, fine or imprisonment. It needs no argument to show that a promise to indemnify a man against all the consequences of an offence cannot be supported on any principle of law." Parke J., after citing the case of *Martin* v. *Blythman*,[4] as being directly in point, said:—"It would be productive of great

[1] Ind. Contr. Act, s. 224.

[2] 1 C. M. & R., 73.

[3] 2 Bing. N. C., 634. See also *Campbell* v. *Campbell*, 7 Cl. & F, 166.

[4] Yelv., 197.

evil if the Courts were to encourage such an engagement as this, and thereby hold out inducements to the propagation of illegal and unfounded charges." Bosanquet J., said "it appears that the publication was made at the solicitation of the defendant; a publication manifestly illegal and open to indictment; at once the subject of an action at the suit of the party offended and an offence against the public. The case therefore does not fall within the principle laid down by Lord Kenyon in *Merryweather* v. *Nixan* The second illustration given to s. 224 of the Contract Act appears to have been taken from the case of *Shackell* v. *Rosier*.

Right to be indemnified against want of skill and negligence of principal —The agent has a right to look to his principal for compensation for any injury caused to him by the principal's negligence or want of skill.[1] It will be sufficient if the injury be shewn to have been occasioned by the personal negligence of the master, by shewing either his personal interference to be the cause of the accident, or that he negligently employed incompetent servants whose incompetency was the cause of the accident; but in the absence of a special contract the principal will not be liable for an accident not proved to have been occasioned by his personal negligence.[2] It is, however, his duty, in the event of his not personally superintending the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work.[3] But in *Ormond* v. *Holland*,[4] the defendants were builders employed in erecting a church; and the plaintiff was working for them as bricklayer. The defendants did not personally interfere in the hiring of the plaintiff, which was by their foreman in the ordinary way with no express contract as to the care to be used by the defendants. The plaintiff was going up a ladder supplied by the builders, when one of the rounds broke, and he fell and was injured. There was some evidence that the ladder was defective, and that the workmen had previously complained amongst themselves of its state, but no evidence that this was brought to the knowledge of the defendants or even of their head servants. It was also shown to have been the duty of the defendant's gatekeeper who was appointed by the foreman, to examine all plant before it went out of the yard and to see that it was fit for use. Both the foreman and the gatekeeper gave evidence that in their opinion the ladder was sound, and that the breaking of the round must have been owing to some unexplained accident. The Court held that there was no evidence of negligence on the part of the defendants. Again where a servant was employed by a master to clean a

[1] Ind. Contr. Act, s 225. See *Paterson* v *Wallace*, 1 Macq., 748. *Brydon* v. *Stuart*, 2 Macq., 30, cited in *Fowler* v. *Lock*, L. R, 7 C. P, (280).

[2] *Osmond* v. *Holland*, 1 El. Bl. & El., 102.

[3] *Wilson* v. *Merry*, L. R., 6 H. L. Sch., (332), per Lord Cairns.

[4] 1 E. B. & E., 102.

dangerous machine, and for that purpose it was necessary for him to get into the machine, and whilst he was so employed, by the negligence of the defendant it was unsafely constructed, and in a defective condition, and was by reason of not being sufficiently guarded unfit to be used and entered, as the defendants knew, and by reason of no sufficient or proper apparatus having been provided by the defendant to protect the servant, the machine was suddenly put in motion, whereby the servant was injured, and subsequently died. In an action by his administrators to recover damages, Martin B., said:—"If a servant be employed by a master to clean or use a defective and dangerous machine, improperly constructed, and without guard, and if the employer knows the defect and danger and the servant does not, and is therefore guilty of no contributory negligence, I am not prepared to say that the servant, in case he is injured whilst in the course of his employment, has no cause of action against his employer, although it may be that the employer did not himself set the machine in motion, but that some third person, unconnected with him, did so."[1]

Liability for negligence in looking to tackle.—In *Murphy* v. *Phillips*,[2] where the plaintiff a stevedore in the service of the defendant, received injuries when engaged in loading a ship for the plaintiff with iron girders. These girders were lifted on the ship by means of a chain attached to a donkey engine; this chain suddenly snapped, and one of the girders fell on the plaintiff causing him injury. In a suit against the defendant for damages, evidence was given to show that the chain was not equal to the strain put upon it, that some of the links were worn, that it was badly welded, that a man accustomed to chains could have seen that it was not fit for use, and that there were well known methods for testing chains, but that this chain had not been tested or examined. The Court held that it was the duty of the defendant to have tested and examined the chain and other machinery used in his business, and that not having done so, he was guilty of negligence and consequently liable.

Question whether the relation between the parties is master and servant or bailor and bailee.—In *Fowler* v. *Lock*,[3] the plaintiff was a cabman driving a horse and cab provided by the defendant a cabmaster, the cabman keeping the earnings of the cab, and paying so much a day to the cabmaster: the plaintiff was hurt owing to the horse which was found not to be fit for the purpose for which it was hired, running away; and he brought an action for damages against the cab-master. The jury found that the horse was not fit to be driven and that the accident was attributable to the horse, and they found for the plaintiff damages £50. A rule *nisi* was obtained to

[1] *Watling* v. *Oastler*. L. R., 6 Ex., 73. See also *Mellors* v. *Shaw*, 30 L. J. Q. B., 333.

[2] 24 W R., (Eng), 647.

[3] L. R., 7 C. P., 272.

enter a verdict for the defendant: for the defendant it was contended that the relation between the parties was that of master and servant and consequently that in the absence of evidence of personal misconduct on the part of the owner, he was not liable. The Court was divided in opinion. Byles and Grove JJ., holding that the relation between the parties was that of bailor and bailee, and consequently, that the proprietor was liable for the injury; whilst Willis J., held that the relation was that of master and servant, and that in the absence of personal negligence or misconduct on his part, the owner was not responsible.

So he is liable where he personally interferes.—Thus where the plaintiff a bricklayer entered into the defendant's service and was directed to do some work to a wall of the defendant's house, against which a scaffold had been erected under the directions of the defendant by another labourer, who had examined the poles and had found them in bad condition, light, and worm-eaten, and had broken several that were rotten and worm-eaten. The defendant came up to the scaffold and asked who broke the putlogs, and the labourer said he had done so; thereupon the defendant said, "You have no business to do so, they will do very well as there are no bricks or mortar to be put upon them, don't break any more." The *defendant* used this scaffold and in consequences of the breaking of a putlog was precipitated from the scaffold and broke his thigh. In an action for damages, the Lord Chief Baron nonsuited him on the ground that there was no evidence to go to the jury, a rule was obtained calling upon the defendant to show cause why the nonsuit should not be set aside, which rule was discharged to enable the plaintiff to appeal, and on the appeal, it was held that it was clear that there was evidence to go to the jury, that the accident was caused by the negligence of the master.[1]

Where master knows, and servant does not know of the defect.—So also he is liable for injury if he order the servant or agent to use machinery or tackle which the master knows and the servant does not know, to be unsound;[2] but if it is known to the servant or to both master and servant he will not be liable.[3]

Exception to the rule that principal is bound to compensate agent for injury caused by his negligence.—Although the principal is bound to compensate his agent for any injury caused to the latter by the principal's negligence, yet if the agent was himself doing the very thing which caused damage and ultimate injury to himself, or, if he obviously encounters a known risk and has done so for years, knowing it to exist, he will not be entitled to compensation.

[1] *Roberts* v. *Smith*, 2 H. & N., 213

[2] *Williams* v *Clough*, 27 L. J. Ex., 325; 3 H. & N., 258, Smith's Master and Servant, p. 149.

[3] *Potts* v. *Plunket*, 34 L T., 111, Smith's Master and Servant, p. 149.

Thus in *Membery* v. *G. W. Railway Company*,[1] a railway Company agreed with a contractor that he should shunt their trucks upon their line, that he should supply horses and men for that purpose, the Company to provide boys to assist in the shunting when they had boys, and when they had not, the shunting to be done without boys. For several years the plaintiff as the servant of this contractor shunted trucks on the Company's line, sometimes with, and sometimes without boys; the plaintiff on one occasion asked the Company's foreman for a boy, but as the Company could not provide one, proceeded to shunt trucks alone, and without any negligence on his part, was injured by a truck running over him. In an action by him against the Company, it was held that there was no evidence of any negligence or breach of duty on the part of the Company towards the plaintiff; Lord Herschell, in the course of his judgment, said:—"I do not for a moment doubt that there was a duty incumbent upon the defendant towards the plaintiff at the time when he was upon their premises. They were not without a duty towards him But it is not enough to arrive at the conclusion that there was a duty, or even a duty to take care, the extent of that duty requires to be determined. My Lords, I cannot doubt that they were bound to take care that the machinery, or appliances, or tackle of theirs, which he had to use in the course of his discharge of those duties in which they were interested, were in a reasonably fit and proper condition; and if the defect in them was unknown to the plaintiff, I cannot doubt that the plaintiff would have his remedy against them. In addition to that I think, they were under the duty to him, having invited him upon their premises, not to permit their premises to be in such a condition that he unwittingly might fall into a trap of the existence of which he, unacquainted with their premises, would be ignorant, by which he might sustain an injury. Further than that it might be, (and I confess that I should myself be disposed to think that it was), their duty to take due and reasonable care that in the carrying on of their business they did not subject him to unreasonable risk owing to the acts which they did in the carrying on of that business. If they were carrying on a dangerous business, and one which would subject people, employed upon their premises for their benefit, to risk, they must take reasonable care, as it seems to me, that they do not any act (I emphatically use the word "act") which would endanger the safety of the persons who thus, to their knowledge, are employed about their business upon their premises. My Lords, assuming all that in favour of the plaintiff his case goes much further, because his allegation amounts, and must amount to this, that the defendants were bound to take care to supply all the assistance, by means of the employment of other persons in addition to himself, which was necessary in order to free his employment from risk ..... Now I am unable to

[1] L R., 14 App. Cas, 179.

see any authority for such a proposition; nor am I able to see that it is to be derived by analogy from any decided cases."

Not liable for injury caused by fellow servant of the servant.—But if there is a relation existing by contract between the person injured, and the person by whose servant the injury is caused, and if the injury, although immediately caused by the servant, is of such a nature that the risk of such injury is a risk incident to the contract, the master will not be liable.[1] The principle on which this rule is based is, that a servant when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow servant when he is acting in the discharge of his duty as servant of him who is the common master of both.[2] This subject will, however, be again referred to in the lecture concerning the liability of an agent to third parties. Nor will he be liable where the agent or servant himself contributes to the injury. This exception, it is true, is not dealt with in section 225 of the Contract Act, but as the Act is not exhaustive, there is no reason to suppose the rule does not apply. The agent or servant will not, however, lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might, or might not, or could not have happened; but he will only lose his remedy if he has been negligent in the final stage and at the decisive point of the event, so that the mischief as and when it happens, is proximately due to his own want of care and not to the defendants.[3] As to the *onus* of proof with regard to contributory negligence see *Wakelin* v. *London S. W. Ry. Company*.[4]

Suits for compensation may be brought by executor, &c.—Before leaving this subject it will be well to add that in cases in which the injury caused to the agent by the negligence or want of skill of the principal, has resulted in death, it is open to the executor, administrator or representative of the deceased person to bring a suit to provide compensation to his family for loss occasioned by such death.[5] And with reference to the measure of damages under that Act see *Vinayak Raghunath* v. *G. I. P. Ry. Company*,[6] *Ratanbai* v. *G. I. P. Ry. Company*.[7]

[1] *Priestly* v. *Fowler*, 3 M. & W., 1. Campbell on Negligence, p. 148.

[2] *Hutchinson* v. *The York Newcastle and Berwick Ry. Co*, 5 Ex., 343; 19 L. J. Ex., 296, per Baron Alderson.

[3] *Pollock on Torts*, p. 374, as to the definition of contributory negligence given by Mr Pigot, see Pigot on Torts, p. 248. *See also Tuff* v *Warman*, 2 C. B. N. S., 740, on appeal, 5 C. B. N. S., 585.

[4] L R, 12 App. Cas, 41.

[5] Act XIII of 1855, s 1.

[6] 7 Bom, H. C. (O. C. J.), 113.

[7] 7 Bom., H. C. (O. C. J.), 120; on appeal, 8 Bom., H. C., (O. C. J.), 130.

LECTURE IX.

DUTIES OF THE AGENT TO HIS PRINCIPAL.

To carry out the agency business—To act in accordance with instructions—Laches in notifying assent to a deviation—Substantial compliance with instructions—Where order is given with reference to trade custom—Where instructions are uncertain and have two meanings—Where no particular instructions given—Where instructions are illegal or criminal—Agent's duty in an emergency—Duty when requested to insure—To act in person—Exception—To act in the name of principal—To use skill and diligence—Illustrations of this duty—Duty of attorney advancing money on mortgage—Amount of skill and diligence required—Proof of skill and diligence—To use diligence in communicating with principal—To pay over monies to principal—To produce documents to persons appointed by principal—To account—Mode of taking the account—Where accounts are falsified—Mistakes and omissions in his accounts—False entries in his accounts—Duty of Commissioner in taking agent's accounts—References in suits for account—Misconduct in not accounting how looked at by Courts of Chancery—Destruction by agent of books—No accounts or vouchers—Payment over to third person—When interest due—Compound interest—Effect of mixing principal's funds with his own—To account to principal only—Duty of partners to account—Of Kurta to account—Of Promoters to account—Of factors to account—Limitation in suits for accounts—General duties of directors how governed—Duty when dealing in business of agency on his own account—Concealment of material facts, effect of—By promoters—Surreptitious dealings between one principal and the agent of the other principal—Concealment in insurance cases—This duty construed strictly—Agent's dealings disadvantageous to principal, effect of—Secret gratuities to agent—Principal may claim irregular profits made by agent—Agent making profit by sale to himself—Where principal is aware of agent's remuneration by others—Partners bound to account for secret profits—Promoters also—Position of promoters—No difference between profits made after agent is appointed and profits through bargains made at time of appointment—When agent may deal in the agency business—Cases in which full disclosure of agent's interest has been made—Onus of proof in establishing agent's mis-feasance.

Duties of the agent to his principal.—In dealing with the subject of the duty of an agent to his principal it will be impossible to prevent encroachment on the subject of the agent's liability to his principal, inasmuch as his liability flows from the non-performance of his duty.

Duty to carry out the agency business.—In considering this duty it will be necessary to enquire whether or no the agent is to receive remuneration for the services rendered to his principal, for on this depends the question whether the agent is bound to undertake and carry out the business of the ageney. If it has been agreed that he is to be paid for his services, he will be, if he undertakes to perform the work, bound to set about and complete it; any

refusal on his part after such acceptance would render him liable to a suit for breach of contract; he is, however, as has been seen, quite at liberty to renounce, on reasonable notice, the business of the agency,[1] subject to the rules as to renunciation which have already been pointed out in Lecture IV. Where, however, he is not to be remunerated it is not incumbent on him to commence the undertaking, and he cannot be compelled to proceed in any way with the task, for his promise to do so is without consideration.[2] But if he shall have once set about the task, and afterwards be guilty of misconduct in performing it, he will although unremunerated, be liable for any loss occasioned, since by entering upon the business, he has prevented the employment of some better qualified person, and the detriment thus occasioned to his principal is a sufficient consideration to uphold an undertaking on his part to act with care and fidelity.[3] The rule is that an unremunerated agent is not liable for *non-feasance*, but is liable for *mis-feasance*.[4]

To act in accordance with instructions.—The agent after accepting the agency, is bound to conduct the business of his principal in accordance with the instructions given to him by his principal, and if he does not do so, he will be liable to his principal for any loss and damage caused.[5] Thus in *Catlin* v. *Bell*,[6] the defendant was intrusted to sell a quantity of millinery which he was to carry from England to the West Indies, and sell for his principal there; the defendant being unable to sell the goods in the West Indies, despatched them to another place in search of a market where they were destroyed by an earthquake, *held* that he had no right to do so, and was therefore liable. So where a person shipped lime on board the defendant's barge for carriage to a certain place and the master of the defendant's barge deviated from his proper course without proper cause, and the barge whilst so out of her course was burnt through the lime becoming heated by communication with salt water, held that as the loss had happened whilst the wrongful act was in operation, the owner of the barge was liable.[7] So where goods were delivered to be carried in the defendant's vessel from Liverpool to Trieste and the ship whilst

[1] Ind. Contr. Act, s 201.

[2] *Elsee* v. *Gatward*, 5 T. R., 143. *Balfe* v. *West*, 13 C. B., 466; 22 L. J. C. P., 175; *Wilkinson* v. *Coverdale*, 1 Esp., 75.

[3] Sm. Mer. Law, 4th ed., 112. *Coggs* v. *Bernard*, 1 Sm. L. C., 200 *in notis*. *Wilkinson* v. *Coverdale*, 1 Esp., 75. *Shillibeer* v. *Glyn*, 2 M. & W., 143. *Smith* v. *Lascelles*, 2 East., 188.

[4] *Balfe* v. *West*, 22 L. J. C. P., 175; 13 C. B., 466.

[5] *Com. Dig.* "*Merchant*" B. Ind. Cont. Act, s. 211 *Corlett* v. *Gordon*, 3 Camp., 472 *Boorman* v. *Brown*, 3 Q B, 511, (529). *Smith* v. *Lascelles*, 2 East., 188.

[6] 4 Camp., 183.

[7] *Davis* v *Garrett*, 6 Bing., 716.

voyaging on her course, deviated therefrom to chase prizes, and whilst in the act of deviating and chasing was captured, and the plaintiff's goods thereby became lost to him, held, that the plaintiff might recover from the defendant.[1] So where the plaintiff instructed the defendants who were brokers to purchase for him 50 bales of cotton and paid to the brokers part of the purchase money; but the defendants made a contract in their own name for the purchase of a much larger quantity, *viz.*, 300 bales on account of the plaintiff and other principals. Pollock C. B., said:—"The defendants were authorized to buy a certain quantity of cotton for the plaintiff; instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people, and the plaintiff was prevented from coming forward and protecting his own rights. I think, therefore, that though a contract was made, it was not the contract the plaintiff authorized the defendants to make, and therefore as he paid the money on the faith that a contract had been entered into, which turns out never to have existed, he is entitled to have it returned[2] The rest of the Court were of the same opinion. If, on the other hand, he has by acting in a manner inconsistent with his instructions, made any profit to himself, he will be bound to account for it to his principal.[3] But where a broker was directed to purchase 280 scrip of "the Kentish Coast Railway Company," and purchased scrip of that name which was on the market, and the genuineness of the scrip was denied by the directors who alleged that it was issued by their Secretary without authority; and the principal then sued the broker to recover the sum expended, on the ground that the scrip purchased was not genuine "Kentish Coast Railway scrip." Alderson B., said, "The question is simply this—was what the parties bought in the market, Kentish Coast Railway scrip? It appears that it was signed by the Secretary; and if this was the only Kentish Coast Railway scrip in the market, as appears to have been the case, and one party choses to sell and the other to buy that, then the latter has got all that he contracted to buy[4] But where clear instructions were given by the plaintiffs to the defendants to insure goods and also the praemium, and the defendants insured the goods but not the praemium, Lord Ellenborough held that the defendants were liable to the plaintiffs for neglect to insure the praemium and this notwithstanding the policy included an illegal clause in another respect.[5] So where a merchant directed a factor to sell wheat at 7 shillings per bushell, and the factor sold for six shillings and four pence

[1] *Parker* v. *James*, 4 Camp., 112.

[2] *Bostock* v. *Jardine*, 34 L J. Ex, 142, 3 H. & C., 700; 11 Jur. N. S., 586

[3] Ind. Contr. Act, s 211. Com. Dig. "Merchant" B. *Russel* v *Palmer*, 2 Wils, 325 *Shiells* v. *Blackburn*, 1 H. Bl., 161

[4] *Lambert* v. *Heath*, 15 M. & W., 486.

[5] *Glaser* v. *Cowie*, 1 M. & S, 52.

claiming to sell on account of advances made by him on the wheat, it was held that he was chargeable.[1] So where a broker in contravention of what amounted to express instructions to deliver for ready money only, delivered on credit, he was held accountable.[2] But where certain merchants consigned to commission agents in China goods to be sold, directing the proceeds thereof to be invested as follows "if tea is not obtainable at our limits you may invest one half of the whole proceeds in silk at prices, &c. ..... if silk is obtainable at much below these prices, you may substitute it in part for tea, even if the latter is to be had within our limits, at your discretion; silk was obtainable at one time within the limits, and they did not execute the order at the time; the Court held that the words "you may invest" were directory, and did not leave the matter to the discretion of the agents, and held them liable in damages.[3] But the agent will not be liable for not following out the instructions of his principal, if to do so would be a fraud upon third persons.[4]

Laches in notifying dissent to a notified deviation from instructions may prevent a plaintiff from recovering.—As where the plaintiff consigned goods for sale to a captain of a ship bound to Calcutta, and directed him to invest the proceeds in certain specified articles; the captain sold the goods and invested the proceeds in sugar which was not one of the articles specified in his instructions, and informed the plaintiff of his purchase by letter. The captain had no commercial establishment in England, but it appeared that a certain insurance broker had acted for him in some insurance transaction, the plaintiff therefore went to this broker more than 2 months after hearing from the captain and notified that he would not accept the sugar, and advised the broker to insure. The broker declined to interfere between the plaintiff and the broker and would not insure; held in an action brought by the plaintiff against the captain to recover the proceeds of the goods shipped by him, that although the captain had not followed out his instructions, yet having given the plaintiff notice of his deviation from the instructions, and the plaintiff not having notified that he dissented until more than 2 months after receiving the notice, he must be taken to have assented to the deviation.[5]

Substantial compliance with instructions sufficient.—But it appears that a substantial compliance with his instructions will if he has acted rightly be sufficient to hold him harmless. Thus in *Johnston* v. *Kershaw*,[6] the defendant directed the plaintiffs to purchase for him 100 bales of cotton of a specified

[1] *Smart* v. *Sandars*, 16 L. J. C. P., 39. See also *Dufresne* v *Hutchinson*, 3 Taunt., 117.

[2] *Boorman* v. *Brown*, 3 Q. B., 511; 11 Cl. & F., 1.

[3] *Entwistle* v. *Dent*, 1 Ex., 812.

[4] *Beswell* v. *Christie*, 1 Cowp., 395.

[5] *Prince* v. *Clark*, 1 B. & C., 186.

[6] L. R., 2 Ex., 82.

quality, the order ran as follows: "I beg to confirm my letter of the 23rd of February, and hope you will have executed fully all the cotton ordered, and consider it still in force. If executed, please regard this as an order for 100 more." The question in the case was, whether the letter meant an order to purchase 100 bales *at once*, in one and the same purchase, or whether it meant an order to purchase 100 bales in such manner, and at such times, as the agents might find it practicable, having regard to the state of the market. The plaintiffs purchased ninety-four bales only Kelly C B, said: "If they (the agents) could at one time have obtained all the 100 bales, it would have been their duty to have done so. But we may fairly conclude from their conduct that they could not They actually bought 94; surely they would, if they could, have bought the remaining six. Not being able to buy them, were they to leave the order altogether unexecuted? Rather, it was their duty, and was I think contemplated by the defendant, that they should buy as many bales as they could get, and make up the total number as soon as practicable. ..... I think, therefore, that although we have no direct evidence to show that the state of the market was such as to render it impossible for the plaintiffs to purchase the 100 bales all at once, that the parties to the transaction must have understood that the purchase was to be made, if necessary, in several minor quantities" Channell B, was of the same opinion, adding — "I am of opinion that the order must not be taken as an order to buy 100 specific bales of cotton at one time, but that the plaintiffs by purchasing 94 bales have executed it with due and reasonable diligence."

Where the order appears to be given with reference to a custom of the trade, or market it will be so construed—In *Boden* v. *French*,[1] where the directions were "please sell for me 200 tons of anthracite coal now lying at Neale's wharf .... at such price as will realise not less than 15 shillings per ton, net cash, less your commission for such sale," and the agent sold 100 tons at 15 shillings and sixpence per ton at two months' credit; and the employer sued the agent for not suing for ready money according to his instructions; Jervis C. J., held that the contract was to say the least of it very doubtful, and that the plaintiff had failed to make out that the authority given by the letter, was to effect sales for ready money only. Cresswell, J., considered that it might be assumed that the contract had some reference to some known usage of the coal trade, and that it was clear that by the usage of the trade, a commission agent might sell without making the purchaser pay to his principal ready money; and that if there had been some usage by which the agent was to pay ready money to his principal, though the sale was on credit, that would seem to be the contract contemplated, by the parties; but that was not the contract on which the plaintiff had declared. Williams J., was of the same

[1] 10 C. B., 886

opinion . and the plaintiff was therefore non-suited. In *Ireland* v. *Livingston*,[1] the order given by the defendant to the plaintiff a commission agent at Mauritius was "to purchase and ship 500 tons of sugar, 50 tons more or less of no moment, if it enable you to get a suitable vessel." Five hundred tons could not be purchased in one lot at Mauritius, and it was the customary course of business there, in carrying out an order for a large quantity of sugar, to purchase it in smaller quantities from time to time from different persons. The plaintiff purchased for the defendant 400 tons, when prices rose, and before he could complete the order, the defendant countermanded it, *held* that the clause as to 500 tons more or less, was not a limitation of the quantity to be purchased, but was a discretion left to the plaintiffs that they might not be fettered in obtaining a vessel; but that the defendant must be taken to have been giving the order with reference to the circumstances of the Mauritius market, and therefore that each quantity as it was purchased by the plaintiff was purchased on behalf of the defendant, and that he was bound to accept it.

Where instructions are ambiguous.—Where, however, the directions given to the agent are in such uncertain terms as to be susceptible of two different meanings and the agent *bonâ fide* adopts one of them and acts upon them, it is not competent to the principal to repudiate the act as unauthorized because he meant the order to be read in the other sense of which it is equally capable. It is a fair answer to such an attempt to disown the agent's authority to tell the principal that the departure from his intention was occasioned by his own fault, and that he should have given his orders in clear and unambiguous terms. In such cases the agent will not be held responsible if any loss is occasioned to the principal.[2]

No particular instructions—Where the principal has given no particular instructions to the agent as to the mode of conducting the business, the latter is bound to conduct the business entrusted and accepted by him, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business.[3] Thus where a factor, who has no special instructions how to sell, and there is no practice to sell on credit, sells on credit to a person of unimpeachable credit, who subsequently becomes insolvent, the factor is chargeable; but where the usage is for the factor to sell on credit, and he sells to a person of good credit at the time, who afterwards becomes insolvent, the factor is not chargeable, but otherwise if it be a man

[1] L. R., 2 Q. B., 99

[2] *Ireland* v. *Livingston*, per Lord Chelmsford, L. R., 5 H. L., (416). See also *Co. Litt.* 42. a *Sheppard's Touch.* ch. v. s. 9. p. 88 and *Rodger* v. *Comptoir D'Escompte de Paris*, L. R. 2. P. C. at p. 406.

[3] Ind. Contr. Act, s. 211. *Wilshire* v. *Sims*, 1 Camp., 258. *Anon. Case*, 12 Mod, 514. *Knight* v *Lord Plymouth*, 3 Atk., 480.

notoriously discredited at the time of sale.[1] So where an agent is employed to sell stock, sold it and took as payment for it a promissory note; and paid the note into his own bankers, where it was attached for a debt of his own, and subsequently the principal refused to make the transfer, as he had received no part of the purchase money, held that as he had not sold the stock in the usual manner he was chargeable.[2] But where a merchant orders an insurance broker to effect a policy of insurance for him on a cargo of corn, without giving any directions as to those with whom the policy is to be effected, and the broker effects the policy with a chartered Company by whose policy corn is warranted against partial losess, although the ship be stranded; and a partial loss happened upon such cargo after a stranding of the ship, held that no action would lie against the broker for not effecting the insurance with private underwriters, who would have been, by the common form of policy used by them, liable for the partial loss.[3] And where a customer delivered to his London bankers certain bills in order that payment might be obtained by them from the acceptor, who resided in London, and the bankers tendered the bills to the acceptor for payment, who gave them a cheque upon a banker in London for the amount, upon receipt of which cheque they delivered up the bills to the acceptor; the cheque was dishonoured, and the customer sued his London bankers for negligence, held that the bankers had acted in the ordinary course of trade and ought not to be made answerable.[4] So where a carrier has instruction to carry goods to a certain place, and the carrier delivers without orders to a person not entitled, he is chargeable.[5] And where a merchant directed his agent to insure a cargo of fruit, but gave no particular instructions how or with whom to insure but merely a general order to insure, and the agent insured with an Insurance Company whose policies upon fruit always contained an exception "free from particular average": the goods suffered a partial loss, and such as were recovered were damaged, and the price fetched did not suffice to pay the salvage on them The plaintiff sued the defendant for not insuring according to his directions The Court held that the plaintiff having given no directions at all, the agent was at liberty, as he acted *bonâ fide*, to elect between the underwriters.[6] However, the law in this country in such a case would be that the agent should act according to the custom prevailing in the place in which he carried on his business; although if there was no particular custom in the place, he should at all events if possible refer to his principal for instructions, and failing any

[1] *Anon Case*, 12 Mod., 515
[2] *Wilshire* v *Sims*, 1 Camp., 257
[3] *Comber* v. *Anderson*, 1 Camp., 523
[4] *Russell* v. *Hankey*, 6 East., 12
[5] *Youl* v. *Harbottle*, Peak. N. P. C., 68
[6] *Moore* v *Mourgue*, 2 Cowp, 479

being sent to him he should act in such way in carrying out his original instructions as a prudent man would act, in his own case under similar circumstances [1]

Where instructions are illegal or criminal—But, although the general rule is that he is bound to follow out his instructions, he will not be so bound when his instructions are illegal or immoral,[2] provided at least that the illegality or immorality formed part of the original agreement between himself and his principal. Thus in the case of *Catlin* v *Bell*,[3] before cited, where the action brought by the principal against the agent was for not accounting for goods delivered to him for sale, and the defence raised to such action was that the agent could not be held liable as the goods were exported without payment of export duties, it was held that this was no defence inasmuch as it was not proved that the evasion of the duties was actually agreed upon between the plaintiff and defendant Nor will he be liable for not following out his instructions where there is an overwhelming force preventing him from so doing, or when the instructions given have become impossible [4]

Departure from instructions justified in a case of difficulty or emergency—Nor will he be bound to follow out his instructions and therefore will not be liable for not so doing, if, in an emergency (there being no time to consult his principal before action taken) he acts, in such manner as a man of ordinary prudence in his own case and under similar circumstances would have acted, for the purpose of protecting his principal from loss;[5] for instructions "in every case of mercantile agency are applicable only to the ordinary course of things, and the agent will be justified in cases of extreme necessity and emergency, in deviating from them"[6] Thus a factor has been held not liable, for selling at a less price than he was authorized to sell at, where he does so with good reason.[7]

Duty of agent requested to insure—In connection with this duty of the agent to follow out his instructions, it may be well to draw particular attention to the duty of an agent requested to effect an insurance Generally speaking, a person to whom an order to insure has been transmitted is under no obligation to accept the trust; but there are certain cases in which an

[1] Ind. Contr Act, 214, 189.

[2] *Holman* v *Johnson*, Cowp, 341 *Ex-parte Mather*, 3 Ves, 373 *Webster* v *De Tastet*, 7 T R, 157.

[3] 4 Camp, 183

[4] Ind. Contr Act, s 56, (cl. 1) *Inder Pershad Sing* v *Campbell*, I L R, 7 Calc, 474 *Smith* v. *Cologan*, 2 T. R, 188 (note)

[5] Ind Contr. Act, ss. 189, 214 *Bell's Principles of Law of Scotland*, 225

[6] Story, 193.

[7] *Com. Dig.* "*Merchant*," B

express order to insure, must be complied with.[1] The rules on this point have been laid down by Buller J., in *Smith* v *Lascelles*[2] as follows:—It is now settled as clear law, that there are three instances in which such an order, (*viz.*, an order to insure given by a merchant residing in England to his correspondent abroad) to insure must be obeyed First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call his money out of the other's hands when, and in what manner, he pleases The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them be such, that the one has used to send orders for insurance, and the other to comply with them, the former has a right to expect that his order for insurance will still be obeyed, unless the latter give him notice to discontinue that course of dealing Thirdly, if the merchant abroad send bills of lading to his correspondent here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accept them, for it is one entire transaction. It is true as it has been observed, that unless something has been held out by the person here to induce the other to think that he will procure insurance, he shall not be compelled to insure. But if the commission from the merchant abroad consist of two parts, the one to accept the bill of lading, the other to cause an insurance to be made, the correspondent here, cannot accept it in part and reject it as to the rest."

To act in person —Next, the agent should act in person, for he who has a bare authority from another to do an act must do it himself, because it is a trust and confidence reposed in him.[3] The exception to the rule that he must act in person, is when by his authority he has an express power to appoint sub-agents, or when an authority so to appoint, may be implied from the nature of the agency, or from the ordinary custom of trade.[4] The true doctrine, says Mr. Justice Story, which is to be deduced from the decisions is, that the authority is exclusively personal, unless from the fair presumption growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent[5] But although an agent cannot in general delegate his authority, yet there are many acts which he must necessarily do through the agency of other persons, and which are valid when so done[6] Thus, as says the Master of the Rolls in the case last cited "when a merchant

[1] *Arnold on Insur.*, 169.

[2] 2 T. R, 187.

[3] *Bacon's Abr.* "*Authority*," *D. Combes's case*, 9 Co., 75. *Catlin* v. *Bell*, 4 Camp., 183

[4] *Cockran* v. *Irlam*, 2 M & S, 301, 303, Ind Contr Act, ss 190 to 195

[5] Story, 301, 303

[6] *Rossiter* v. *Trafalgar Life Assurance Association*, 27 Beav., 377,

receives goods from abroad for sale, and he deputes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly; in that case it would be impossible for the consignor to say, that the sale was void because the merchant did not personally sell them himself, but employed another person for that purpose, by whom the sale was effected The merchant would no doubt be answerable for the acts of his foreman, but provided the acts done were proper and within the scope of his authority, they would be the acts of the merchant himself"

To act in name of principal.—Further, the agent should act in the name of his principal; for in undertaking the agency and acting for his principal, he sinks his individual character, and undertakes to represent his principal only. This rule is of very ancient date and has been laid down as follows—"Where any one has authority as attorney to do any act, he ought to do it in his name who gives the authority, for he appoints the attorney to be in his place, and to represent his person; and therefore the attorney cannot do it in his own name, nor as his proper act, but in the name, and as the act of him who gives the authority [1]

To use skill and diligence in the matter of the agency.—Next, an agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaging in a similar business,[2] unless the principal has notice of his want of skill, and even in such case he is bound to act with reasonable diligence and to use such skill as he possesses;[3] These rules equally apply to both remunerated and unremunerated agents · where therefore the principal employs a person as his agent whom he knows to be an unprofessional man, employs an agent unskilled in the particular line of business which forms the subject of the business of the agency, in which case notice of his unfitness for the work would probably be presumed,[4] he does so at his own risk, and can only expect from such agent reasonable diligence and such skill as the agent possesses; but where he employs a professional person as his agent, he has a right to expect from him as much skill in the business as may fairly be expected from his situation or profession, and the criterion of this skill, is, has the agent exercised such an amount of reasonable skill as is ordinarily possessed and exercised by persons of common capacity engaged in the same business [5] If therefore the agent does not possess the proper skill, or if possessing it, fails to use it; or if he is in any respect deficient in the exercise of that diligence

[1] *Coombes's case*, 9 Co, 76, *b* *Comyn's Dig* "*Attorney*" *C*, 14, 1 Rol Abr, 880, ll 35 Sec Act VII of 1882, s 2

[2] Ind Contr Act, s 212 *Chapman* v *Walton*, 10 Bing, 57

[3] Ind Contr. Act, s. 212

[4] Ind Evid Act, s 114

[5] Ind. Contr. Act, s 212 *Chapman* v *Walton*, per Tindal C J., 10 Bing, 59, (63)

which is necessary to the due fulfilment of the duties undertaken by him, he will be responsible to, and will be bound to compensate his principal for the direct consequences of his own neglect, want of skill, or misconduct in the business of the agency,[1] but will not be liable in respect of loss or damage which is indirectly or remotely caused by such neglect, want of skill, or misconduct.[2]

A few cases in illustration on each of these points will be sufficient upon this subject.—Thus, where a broker effecting an insurance omitted to communicate a material letter by reason whereof the assured failed in his action against some underwriters, and before further suing others, offered the broker the opportunity of defending against other underwriters; on the broker's refusal to take up the cases, the assured, without further reference to the broker, made restitution to other underwriters who had paid the losses without suit, *held* that the assured was entitled to recover his loss from the broker.[3] So where an attorney for the plaintiff suffered his client's case to be called on without previously ascertaining whether a material witness, whom the plaintiff had undertaken to bring into Court, had arrived, in consequence of which the plaintiff was nonsuited; held, in an action against the attorney for negligence, that the attorney had not used reasonable care and diligence in not previously ascertaining whether the witness had arrived, and in case he had not arrived, in not withdrawing the record had he found that he was not present.[4] So where an attorney after accepting a retainer, and stating that he did not require to be put into funds, but on subsequently discovering that another suit was being brought by others against the same subject matter, refused to proceed without being put in funds, held that he was guilty of a grievous error and of want of professional skill, and should be deprived of his costs.[5] So where the plaintiff, a merchant instructed a broker to insure £1,000 on goods shipped at Malaga on board the Pearl for a part of the voyage, *viz.*, from Gibraltar to Dublin, these instructions were given by a letter written from Malaga:—The broker procured an insurance to cover goods laden at Gibraltar and not at Malaga The vessel sailed for Malaga and in her course hove to at Gibralter bay, and sent her letters on shore but did not touch at Gibraltar, but on the same day proceeded on her voyage and was lost. It appeared that the broker had communicated the terms of the policy to the plaintiff who had approved of them. The underwriters refused to pay, and in an action brought by the plaintiff against the underwriters on the policy, he was nonsuited. The plaintiff then sued the

[1] Ind. Contr Act, s. 212. *Crawley* v *Maling*. 1 Agra H. C, 63 *Stannard* v *Ullithorne*, 10 Bing, 491. *Chapman* v. *Walton*, 10 Bing 59 *Godefroy* v. *Jay*, 7 Bing, 413.

[2] Ind. Contr. Act, s 212

[3] *Maydew* v. *Forrester*, 5 Taunt., 615.

[4] *Reece* v. *Rigby*, 4 B. & Ald, 202.

[5] *In the matter of an Attorney or Proctor*, 1 Ind. Jur. N. S., 305.

broker for his neglect, *held* that he was entitled to recover, Parke B., saying:—"It is of very great moment that those who undertake such important business as this, for others who are abroad, should be acquainted with the proper mode of transacting it, and if they undertake it without such knowledge, they are liable to the assured for the consequences."[1] Again where the plaintiff directed the defendant to effect a policy "for £550 on a ship and her freight from Teneriffe to London at 10 guineas per cent.," and the defendant affected the policy in the words of the order communicated to him, but without inserting a liberty "to touch and stay at all or any of the Canary Islands." The ship having taken in goods at Teneriffe proceeded to Lazaretto to complete her cargo and was afterwards captured. The underwriters refused to pay on the ground of the deviation. Witnesses were called to prove that it was the invariable practice, without any particular instructions for that purpose, to insert in the policy, "a liberty to touch and stay at all or any of the Canary Islands," as ships seldom took in the whole of their cargoes at Teneriffe. Lord Ellenborough held that under these circumstances the defendant was liable for not having inserted the clause in the policy, and the plaintiff recovered a verdict for the sum directed to be insured, deducting the praemium.[2] But insurance brokers will not be held liable for negligence, for neglect to insert in a policy a liberty to carry simulated papers, if the written instructions given them contain no direction for that purpose, although it may have been verbally communicated to them that simulated papers were to be used in the voyage.[3] So where the plaintiff and his two partners employed the defendants who were accountants to make out the accounts of the firm and of the separate balance of each partner, and the defendants made out the plaintiff's separate balance so erroneously and negligently that he was a considerable loser thereby, inasmuch as the affairs of the firm were subsequently submitted to arbitration, and the arbitrator conformable to the statement of account given by the defendants found that the plaintiff was liable to pay to one of his copartners a large sum of money, *held* that he was entitled to sue the defendants alone, as although up to a certain point the duty of the defendants was one in which all the partners had a common interest, yet as to the separate balances, they were in interests adverse to one another, and that he was entitled to a verdict for the damages claimed by him.[4] But it is not the duty of a broker to inspect and report on the quality of the goods, but merely to fulfil his commission; thus in *Zuilchenbart* v. *Alexander*,[5] the plaintiffs were merchants who had employed the defendants to purchase

[1] *Park* v. *Hammond*, 6 Taunt., 495, 4 Camp, 344.

[2] *Mallough* v. *Barber*, 4 Camp., 150.

[3] *Fomin* v. *Oswell*, 3 Camp., 356.

[4] *Story* v. *Richardson*, 6 Bing. N. C., 123.

[5] 30 L. J. Q. B., 254.

certain iron which belonged to a person for whom the defendants were acting as brokers, after enquiring from them the description of the iron and the freight, to which enquiry the defendants had replied describing the iron, but stating that they could not specify the freight; the plaintiffs then directed the defendants to get them a vessel and to ship the iron. The defendants, according to usage were paid brokerage by the seller of the iron only, and not by the purchaser, and the defendants as agents for buyers and seller executed the contract. The iron was duly shipped, but it was found by the person for whom the plaintiffs purchased to be of very inferior quality to that described in the contract, and it was therefore rejected, and the plaintiffs sought to charge the defendants with the loss they sustained on the ground that they had not seen that the iron delivered was according to the contract. The Court held that it was not the duty of the defendants to inspect the iron, either in their characters of broker or shipping agent, no usage to that effect having been proved. But an agent buying indigo seed in a rising market under an order to purchase on the most favourable terms cannot experiment by sowing a sample and waiting before they purchase to see whether it will germinate; all that such an agent is bound to to do, is to act to the best of his judgment and to use proper care and skill in purchasing what they are required to purchase, and their action cannot be repudiated unless they are shown to have been guilty of negligence.[1]

Duty in presenting bill of exchange for acceptance, and time when he should do so.—It is the duty of the agent to obtain acceptance of a bill if possible, but not to press unduly for acceptance in such way as to lead to refusal, provided that the proper steps are taken within that limit of time which will preserve the rights of his principal against the drawer.[2] As to what is considered reasonable time see *Mellish* v. *Rawdon*,[3] *Mullick* v. *Radakissen*,[4] *Shute* v. *Robins*.[5]

Duty of attorney when acting for client.—So in undertaking a client's business an attorney or agent, undertakes on his own part for the existence and the due employment of skill and diligence, and where the client sustains an injury in consequence of the want of the attorney's skill and diligence the attorney is responsible.[6]

Duty of solicitors when advancing money on mortgage.—The duty and responsibility of solicitors when entrusted with money for investment has been well explained in *Dooby* v. *Watson*.[7] The cases in which a solicitor acts in

[1] *Betts* v. *Arbuthnott*, 19 W. R, 65, in Court below 6 B L R, 273.

[2] *Bank of Van Diemen's Land* v *Bank of Victoria*, L. R., 3 P. C, 526. *Agabeg on Bills*, 69.

[3] 9 Bing, 421

[4] 9 Moo P. C. C., 66.

[5] 3 C. & P., 82.

[6] *Hart* v. *Frame*, 7 Cl. & F, 193.

[7] L. R., 39 Ch. D., 178.

his proper character, may be divided into three classes, all of common occurrence. In the first case where he receives a certain sum of money in order to invest it in a particular mortgage; and his client, either on his own selection, or on the advice of the solicitor, has determined to invest a particular sum on a particular mortgage, in that case all the solicitor does is the legal business, receiving the money and seeing, when the proper time arrives, that the deeds are executed and the money handed over to the mortgagor. His duty in that case is simple, but important, and large sums very often pass in that way. In the second case, he receives money in order that he may himself find mortgages to be approved by the client. He retains the money in the meantime; he then from time to time reports to his client what mortgages or other investment he has found. He does whatever business is necessary—advises his client as to the precautions to be taken, and ultimately sees the money handed over either as a whole or in parts to the mortgagee or mortgagees. Beyond that there is a third class, equally common but distinct from the others, where the solicitor does far more than he does even in the second class—that is to say where the client, for some reason, takes little part, perhaps no part at all, in the investment. He may be abroad, ... the solicitor acting under a power of attorney. All the client then requires is to know that the money has been invested, and that the interest will be payable and be paid. In that case the solicitor has an onerous duty to perform, because, beyond providing the mortgages, beyond doing the mere legal business, he really undertakes the responsibility to his client of seeing that they are good mortgages, on which the money may be safely invested. That is within the ordinary duty of solicitors according to the practise of the profession, and is a more onerous duty, and one which some solicitors decline to undertake. Where a solicitor is instructed to sell an estate and invest the proceeds, and he does so invest, but the security taken turns out to be insufficient, in such case if it could be shewn that the business was not well done, that he did not bring to bear reasonable skill and diligence, or if he neglects to take those precautions which he ought to have observed, or more, if he does not manage to acquire the knowledge of what he might be presumed to know for the sake of his client, he is liable in an action for negligence, if such action is brought within the time allowed by the Statute of Limitations; but if, under the above instructions, he finds an investment for his client, which is reported to the client and approved by him, such a case would fall under the first class above mentioned, though in the first instance it would be one of the second class, that is to say, the client having asked the solicitor to invest a sum on mortgage to be found by him and approved by the client, the solicitor retaining the money before anything was really settled although the mortgage was found and the money being in the solicitor's hands to be invested in a particular mortgage. Such circumstances would amount to a trust for *that purpose*, not, however, in

the technical sense of the word, but a trust, a confidence, a duty, which would be performed and cease altogether when once the mortgage is executed and would not be such a trust as would give the go-by to the Statute of Limitations. His duty when acting for both vendor and purchaser will be found discussed in *Fry* v *Lane*[1]

Amount of skill and diligence required—The skill and diligence required from the agent is, as has been seen, such as is generally possessed by persons engaged in similar businesses. Where the agent employed is a professional person whose every day business is of a scientific nature, *i. e*, whose profession is connected with science or art, the mode of ascertaining whether or no he has applied the necessary amount of skill and diligence in the work on which he is employed, is, by taking the opinion of "expert" witnessss skilled in such science or art[2] The words "science or art" are said by Sir James Stephens to include "all subjects on which a course of special study or experience is necessary to the formation of an opinion."[3] In some cases, however, it may be difficult to determine whether the particular enquiry be one of a scientific nature or not, and consequently whether "expert" witnesses may or may not pass their opinions upon it[4] It can hardly be said, that the ordinary class of agent, such as brokers, factors, commission agents, banians, ship's husbands, or wharfingers are agents engaged in scientific pursuits, and to such agents section 45 of the Evidence Act would not therefore apparently apply. Accordingly in England, there have been divergent opinions as to whether such witnesses can be called, in one case an action had been brought on a policy of insurance and the question was whether facts withheld from the underwriter were material, and whether witnesses conversant with the business of insurance could be asked their opinions on this subject; and in another case where the action was against the insurance broker for negligence, in not altering a policy according to instructions, the question was whether other insurance brokers could be called to state their opinion as to what the conduct of persons similarly situated ought to have been? In the former case,[5] it was held that witnesses are not to be permitted to state their views on matters of moral or legal obligations, or on the manner in which other persons would probably have been influenced had the parties acted in one way rather than the other. Whilst in the latter case,[6] (in which the finding of the jury appears to have been peculiar), Tindal C. J., said:—"The point, therefore, to be determined is, not

[1] 58 L. J. Ch, 113.
[2] Ind. Evid. Act, s 45
[3] Objects and Reasons for the Evid. Act.
[4] Taylor on Evid, 1211
[5] *Campbell* v. *Richards*, 5 B. & Ad., 840, (846).
[6] *Chapman* v. *Walton*, 10 Bing., 57, 63

whether the defendant arrived at a correct conclusion upon reading the letter (of instructions), but whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill, and judgment. This is a question, of fact, the decision of which appears to rest on this further inquiry, *viz.*, whether persons exercising the same profession or calling, and being men of experience and skill therein, would or would not have come to the same conclusion as the defendant If the defendant did not contract that he would bring to the performance of his duty, on this occasion, an extraordinary degree of skill, but only a reasonable and ordinary proportion of it, it appears to us that it is not only an unobjectionable mode, but the most satisfactory mode of determining the question, to show by evidence whether a majority of skilful and experienced brokers would have come to the same conclusion as the defendant. If nine brokers of experience out of ten would have done the same as the defendant under the same circumstances, or even if as many out of a given number would have been of his opinion as against it, he who only stipulates to bring a reasonable degree of skill to the performance of his duty, would be entitled to a verdict in his favour. And there is no hardship upon the plaintiffs by this course of proceeding, for they might have called members of the same profession or trade to give opposite evidence, if the facts would have warranted it."[1] However, as I have said, it is doubtful if a policy broker, and indeed the other classes of agents to whom I have referred, can by any possibility be said to be "persons specially skilled in science or act" within the meaning of section 45 of the Evidence Act Presuming, therefore, that they cannot be so classed, evidence of other persons of the same class necessary to show to the Court that such classes of agents have exercised the amount of skill and diligence required by section 212 of the Contract Act, if on the question of "the usages of any body of men" might be receivable under s. 49 of the Evidence Act, or, where there is no usage in question, probably under s. 11 of that Act; on the other hand where the agent, whose skill and diligence it is proposed to prove by calling other agents in the same line of employment, is one who clearly falls within the class of a scientific agent, such for instance, as an engineer, (in the higher sense of the word) surveyor, master of a ship, attorney, &c. evidence of such person would rightly be receivable under s. 45 of the Evidence Act.

To use diligence in communicating with his principal in cases of difficulty.—Next, it is the duty of the agent in all cases of difficulty, to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions.[2] And in cases of emergency, where there is difficulty,

[1] *Chapman* v. *Walton*, 10 Bing, (63), but see *Campbell* v *Richards*, 5 B. & Ad, (840). See also *Greville* v *Chapman*, 5 Q B., 731.

[2] Ind. Contr. Act, s. 214. *Callander* v. *Oleroh*, 6 Scott., 761.

he should endeavour, if it is possible, to communicate with his principal before taking upon himself to act although if it is impossible to obtain instructions, or if he has asked for instructions and obtained no reply, he would be justified in an emergency in doing his best to protect his principal's interest; but he should even then be careful to act as a person of ordinary prudence would act in his own case.[1] Examples of the duty may be found in cases where masters of ships are acting for owners at home, see the cases noted below[2]

To pay over monies to principal.—It is further the duty of an agent to pay over to his principal all sums received by him on account of his principal, retaining however, any sum that may be due to himself for expenses incurred, and advances made or remuneration due in respect of the business of the agency;[3] and this notwithstanding the claims of third persons;[4] and, as will be seen hereafter, he will be bound to pay over to his principal any profit or over-charges that he may have made,[5] and this rule that the agent is bound to pay over to his principal all sums received by him on account of his principal has been held good even although the contract of sale by which monies are received be illegal or void.[6] But a wager is not in itself an illegal contract, and if an agent be employed by his principal for a commission to make bets, and he receives the winnings, he is bound it pay to the principal, and will be liable to an action if he do not do so[7] But if he be so employed and fails to make the bet in accordance with his instructions, the principal cannot maintain an action for breach of contract and recover as damages the gains to which he would have made had the instructions been carried out.[8]

To produce documents to persons appointed by principal.—It is also the agent's duty to produce such documents as he has in his hands to persons appointed by his principal; he, however, is not bound to produce them to an improper person.[9]

Duty to account—Next, the agent is bound to render proper accounts to his principal on demand,[10] for it is his duty to be constantly ready with his

[1] Ind. Contr Act, s. 189.

[2] *Wilson* v. *Miller*, 2 Stark, 1. *Vleirboom* v *Chapman*, 13 M & W., 230. *Roux* v *Salvador*, 3 Bing. N. C, 266 *Duncan* v *Benson*, 3 Ex, 644. *Acatos* v *Burns*, L R., 3 Ex. D., 282, and see Lecture V, pp 133 to 136.

[3] Ind. Contr. Act, s 218.

[4] *Nicholson* v *Knowles*, 5 Madd, 47.

[5] *Morison* v. *Thompson*, L R 9 Q B., 480. *Williamson* v. *Barbour*, 37 L T. N. S, 698; L. R., 9 Ch, 529.

[6] *Joseph* v. *Solano*, 18 W. R., 424.

[7] *Bridger* v. *Savage*, L. R., 15 Q. B. D., 363.

[8] *Cohen* v. *Kittell*, L. R, 22 Q B. D., 680.

[9] *Dadswell* v *Jacobs*, L. R., 34 Ch. D., 278.

[10] Ind. Contr. Acts, 213.

accounts, and neglect in this respect is a good ground for charging him with interest.[1] An account must, however, be demanded from him, or the agency terminated, before a suit is resorted to.[2] But if no account is rendered within a reasonable time, and he is found accountable, he must bear the costs of the suit instituted to have an account taken, and it is no excuse to say that he tendered a gross sum, which, as it eventually turned out, was sufficient to have covered all that was due from him.[3] And where the suit has been brought, and a decree passed directing him to account for all monies that have come to his hand, he can only discharge himself by so doing, and it is always open to the decree-holder to show that this has not been done.[4]

Mode of taking the account.—Moreover it is the duty of the agent to account irrespective of any contract to that effect, and he will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts, without attending to explain them, and producing vouchers by which the items of disbursement are supported; and when this is done, it is the province of the principal to point out the entries in such accounts which he alleges to be erroneous, and, in respect of transactions not shown in the accounts, to state what monies have been received and not credited; and it then becomes the duty of the judge or officer directed to take the account in the suit in which the account has been ordered, to proceed to deal with the questions thus raised between the parties, treating each item separately.[5] If on the other hand, no sufficient accounts have been rendered by the agent, the proper and convenient mode of so doing is for the Court to fix a day before which the defendant should file a written statement of his accounts, exhibiting therein all the items of receipt for which he is accountable on one side, and all items of disbursement on the other, and to fix another later day before which the plaintiff should file any objections which he may have to make to these accounts when filed, and finally the Court ought to appoint a third day upon which an enquiry into the truth and correctness of the statements of account filed by the defendant should be made, and on that enquiry he will take all such evidence in the way of books, and vouchers, and so on, as the defendant is entitled to produce, as well as the testimony of necessary witnesses, and also all evidence on the part of the plaintiff tending to invalidate the accounts or to surcharge them; and eventually upon the determination of the enquiry, the Judge should satisfy himself as to the amount which is

[1] *Pearce* v *Green* 1 Jac. & Walk, 135.

[2] Act XV of 1877, Sch. II Art, s. 88, 89. *Topham* v *Braddick*, 1 Taunt., 572.

[3] *Collyer* v. *Dudley*, 1 Turn & Russ., 421. 2 L J. Ch, 15

[4] *Woomanath Roy Chowdhry* v. *Sreenath Singh*, 15 W. R., 260.

[5] *Annoda Persad Roy* v. *Dwarka Nath Gangopadhya*, I. L R, 6 Calc., (757).

due upon the account as established by the evidence of both parties, and frame his decree accordingly. He ought not to give a decree for alternative damages founded upon any antecedently estimated amount, which must, apart from the evidence be simply a matter of conjecture or of claim. He should give no decree other than an order on the defendant to file his accounts before the accounts have been taken, and then confine his decree to such amount as he may find to be due upon the proper taking of the accounts against the defendant; and if the defendant prove contumacious with regard to filing his statement of accounts, the Judge may proceed with the taking of accounts against him on the footing of evidence furnished by the plaintiff, and in so doing he may make all reasonable presumptions against the defendant.[1] The agent when so accounting, should, however, to enable him to prepare such accounts as the principal is entitled to, be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the plaintiff's possession, as may be necessary for the preparation of his accounts.[2] And it should be distinctly made known to the agent the specific period over which the account is required, the property or matter as to which the account is sought, and the nature of the accounts required.[3] And although the procedure laid down in *Annoda Persad Roy* v. *Dwarka Nath Gangopadhya*, ought to be followed, yet if in a suit in the mofussil a principal prays merely that the defendant be ordered to render an account, a second suit brought by him for the recovery of the money found due by the defendant on examining the accounts will not be barred as *res judicata*.[4] And where a defendant in a suit for a balance of an account due to the plaintiff as a commission agent, denies the agency, and alleges that there is a contract of sale, the burden of proving that he has sustained losses in his capacity of agent is on the plaintiff, and his case will not be made out by uncorroborated entries in his account books.[5] In taking an account between an agent and his principal, either party are at liberty to waive inquiry as to particular periods of time, or particular departments of expenditure; but neither are at liberty to shut out the other from inquiry otherwise;[6] it may, however, possibly be the case that in a suit for an account, the issue between the parties is so simple, and so clearly raised and met by evidence as to be ready for decision at the time, but the general rule is the

[1] *Syud Shah Alaiahmed* v. *Nusibnn*, 24 W. R., 70.

[2] *Annoda Persad Roy* v. *Dwarka Nath Gangopadhya*, I. L. R., 6 Calc., 758. See als *Degamber Mozumdar* v. *Kallynath Roy*, I. L. R., 7 Calc., 654.

[3] *Pran Nath Chuckerbutty* v. *Beny Ameen*, 9 W. R., 250.

[4] *Gobind Mohun Chuckerbutty* v. *Sherriff*, I. L. R., 7 Calc., 169. See also *Syfoollah Khan* v. *Jhapa Thakoor*, 20 W. R., 309.

[5] *Jugal Kishore* v. *Girdhar Lal*, I. L. R., All., 12 Ind. Jur., 216.
Hurrinath Rai v. *Krishna Kumar Bakshi*, I. L. R., 14 Calc., 147.

other way.[1] In taking an account the agent is *primâ facie* liable for what he has received, and is bound to discharge himself; but the evidence which is considered sufficient to discharge him, may vary as to different items, and he certainly may be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transactions which have taken place long ago, though under circumstances which prevent any absolute bar by lapse of time.[1] The agent, however, may be freed from liability if he accounts and shows that he has expended such monies as came to his hands for his principal's benefit and with his express authority.[2] But where he denies receipts, his fiduciary position and his accountability *in totu*, and this defence is shewn to be false, he will be ordered to pay the whole costs of litigation.[3] Where there has been on the part of the agent any fraud or imposition, the whole account, though settled, may be re-opened.[5] And where the plaintiff alleged an open account and in general terms falsification, and the defendant pleaded an account stated and required a specific statement of falsification which the plaintiff refused to give, the Court although holding that the account was settled and that the defendant was entitled to a verdict, yet allowed the plaintiff to amend by stating instances of falsification.[4] Although where there are only mistakes and omissions in a stated account, the party objecting will be allowed no more than to surcharge and falsify, yet if it is apparent to the Court, that there has been fraud and imposition, the whole account will be re-opened, notwithstanding that the account was of 23 years' standing,[5] and this even where the fraud is discovered after the account is balanced.[6] So where the defendant acted as the plaintiff's agent in certain commercial transactions up to July 1867, when the plaintiff fell into difficulties and executed a composition deed under the Bankruptcy Act, whereby he covenanted to pay eight shillings in the pound to his creditors, they releasing him from all his liabilities. The defendant was not present at the meeting at which the composition was agreed upon, but afterwards claimed to be a creditor in respect of the said transactions for £300, and his name was inserted in the schedule, and he assented to the deed and received the composition payable thereunder. But afterwards the plaintiff investigated the defendant's accounts, and then for the first time discovered that the defendants had in his accounts inserted numerous false charges of the amounts paid by him

[1] *Hurrinath Rai* v. *Krishna Kumar Bakshi*, I. L. R., 14 Calc., 147

[2] *Fagan* v. *Chunder Kant Banerjee*, 7 W. R., 452. See also as to set off *Mohima Runjna Roy Chowdhry* v. *Nobo Coomar Misser*, 18 W. R., 339.

[3] *Moseley* v. *Cowie*, 47 L. J. Ch., 271. *Clarke* v. *Tipping*, 9 Beav., 284

[4] *Moseley* v. *Cowie*, 47 L. J. Ch., 271.

[5] *Vernon* v. *Vernon*, 2 Atk., 119. See also *Clarke* v. *Tipping*, 9 Beav., 284. *Moseley* v. *Cowie*, 47 L. J. Ch., 271. *And Chambers* v. *Goldwin*, 5 Ves., 837.

[6] *Vagliano Bros.* v. *Bank of England*, L. R., 22 Q. B. D., 103.

on account of these transactions, and he then filed a bill for an account, it was held that the composition deed was no bar to the decree for account in favour of the plaintiff.[1] Further where accounts are impeached, and it is shewn that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened, and will not merely give liberty to surcharge and falsity; and supposing a fiduciary relation to exist between the parties, the Court will make a similar order if such accounts are shewn to contain a less number of errors, or if they contain any fraudulent entries.[2]

Duty of Commissioner in taking accounts.—Where the accounts in a suit have have been referred to a Commissioner appointed by the Court under s. 394 of the Civil Procedure Code, with powers under s. 398; it is his duty to make out an account showing to the Court exactly what the account in the books of account show, and nothing else; he is practically to place himself in the position of an assistant to the Court, so as to give the Court all the information which the accounts give, so as to enable the Court to deal with them in a satisfactory manner. And where the accounts are ambiguous, or where they do not disclose the facts, it is his duty to take evidence on that point, so as to report to the Court what is the meaning of any particular series of entries, for the purpose of enabling the Court to give a judgment upon them. He has no power to deal with the case as though he were a judge or an arbitrator, or to give a judgment either in favour of the plaintiff or the defendant; and where he did so, the Court treated his report as non-existent; and itself decided the matter of account on such materials as were before it.[3]

Reference in suit for account.—Where in a suit for an account, it was ordered by consent of the parties that the cause should be referred to a Commissioner to take accounts, who in taking them was to decide upon all questions of fact, whether as to the delivery of certain merchandise delivered, or otherwise with full powers for the purpose of the investigation; and that if questions of law should arise and could not be settled or disposed of before the Commissioner, they were to be submitted to the Court, their Lordships of the Privy Council were of opinion that such a reference was different from the ordinary reference to a Commissioner to examine accounts under the Code of Civil Procedure, and expressed a doubt whether it were competent for the Court to re-open the question of account against a clear finding upon a question of fact relating to the account made by the Commissioner upon the evidence properly before him.[4]

[1] *Pike* v. *Dickinson*, L. R., 12 Eq., 64.

[2] *Williamson* v. *Barbour*, L. R., 9 Ch. D., 529. Applicable in India so as to stay limitation only where there is fraud.

[3] *Tincowri Debi* v. *Satyadyal Banerjee*, per Pethram C. J., app. from Orig. decree, No. 323 of 1875, decided by Pethram C. J., and Gordon J., on the 2nd August, 1889.

[4] *Watson* v. *Aga Mehedee Sherajee*, L. R., 1 I. A., 346.

Misconduct in not accounting, how looked upon by Court of Chancery in the case of a general agent.—The neglect of an agent, a solicitor, to keep regular accounts and preserve vouchers against himself has been held by the Court of Chancery sufficient to warrant the total disallowance of a bill of costs for business done as a solicitor on behalf of his principal, the principal having died before the bill was presented, and the agent having acted as the principal's confidential agent and receiver of his rents;[1] the principle on which this decision was based being that a general agent is in duty bound to keep regular accounts of his money transactions, for when such an agent is employed, he has the power of receiving money to an amount which there is no means of getting at, unless regular accounts of receipts and payments are kept by him. This was pointed out by Sir W Page Wood *in re Lee ex-parte Neville*,[2] where his Lordship held that the principle of *White* v. *Lady Lincoln* did not apply where the solicitor was not the general agent of the client, so as to be able to receive the client's money at all times without his knowledge, but only received money for him in respect of separate transactions of which the client was aware at the time, and knew what was to be received.

Destruction of books No accounts or vouchers Unascertainable claims—Where an agent has refused to account and there is evidence of spoliation of bank books, he will be answerable for the principal sum in which he is charged to be accountable, and for interest thereon in lieu of the profits he has failed to account for.[3] And where he has kept no regular accounts and vouchers of the business of the agency, the omission so to do, will always be construed unfavourably to the agent;[4] and where an agent made claims for expenses on account of his principal, which, from the conduct of the agent undertaking the business without authority or agreement, could not be ascertained, such claims were disallowed[5]

Payment over to third parties—And as a general rule, an agent or collector cannot discharge himself respecting monies for which he is liable to account, by proving payments or advances to third parties, unless he can show that such payments or advances were made by the express authority of his principal or with his knowledge and consent[6]

Interest.—Where the agent retains monies of his principal, which he has not been required to pay, he should not ordinarily be required to pay interest; but if his conduct has been fraudulent, he should be charged with in-

[1] *White* v. *Lady Lincoln*, 2 Ves, 363.

[2] L R., 6 Ch, 43, (45)

[3] *Rampershad Tewarry* v *Shev Chunder Doss*, 10 Moo, I. A., 490

[4] *Chedworth (Lord)* v. *Edwards*, 8 Ves, 46, (49).

[5] *Beaumont* v *Boultbee*, 11 Ves., 358

[6] *Fagan* v *Chunder Kant Banerjee*, 7 W. R, 542

terest;[1] or where a demand has been made, or where the agency is terminated, and no accounts have been rendered, it is presumed that interest would be chargeable at the discretion of the Court. So if money be remitted to an agent, and he make use of it for his own trade, he will be liable for interest, but if he leave it dead in his own hands it appears that he has been considered not liable.[2] The case of an auctioneer receiving a deposit appears to be treated differently, Lord Tenterden C. J., in *Harington* v. *Hoggart*,[3] distinguishes his case as being that of a stakeholder, from that of an agent, and says:—"A stakeholder does not receive the money for either party, he receives it for both and until the event is known, it is his duty to keep it in his own hands; if he thinks fit to employ it, and make interest of it, by laying it out in the funds or otherwise, and any loss accrue, he must be answerable for that loss; and if he is to answer for the loss, it seems to me he has a right to any intermediate advantage which may arise." Nor will he be liable for interest if he invest such deposit at the request of one of the parties to the auction sale.[4] A late case that of *Harsant* v. *Blaine*,[5] has decided that an agent is bound to account, and on refusal is chargeable with interest so long as he fails to render an account. And where an agent instead of submitting to an account, falsely denied his receipts, his fiduciary position and his accountability, and a decree for an account was made, the Court held that he should be directed to pay the whole costs of the suit, independently of the result of the account.[6] It has been said by a learned Judge, however, that "interest should be allowed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes; or where there has been an express promise to pay interest, or where from the course of dealing between the parties, it may be inferred that this was their intention, or where it can be proved that the money has been used, and interest has been actually made."[7] Further, if the agent has made a profit by trading or has received interest on his principal's money whilst in his hands, the agent will be bound to account both for profit and interest.[8]

Compound Interest.—And with regard to the subject of charging the agent compound interest, although interest, is entirely in the discretion of the Court, except when provided for by contract or special Acts, it may not be out of place to refer to the principles laid down in England on this point.

[1] *Sital Pershad* v. *Monohur Doss*, 23 W. R., 235. *Turner* v. *Burkinshaw*, L. R, 2 Ch., 488.

[2] *Rogers* v. *Boehm*, 2 Esp., 701.

[3] 1 B. & Ad., 577.

[4] *Harington v. Hoggart*, 1 B. & Ad, (589).

[5] 12 Ind. Jur., 79 per Ld Escher, Lindley and Lopes L. J.

[6] *Hurronath Roy* v. *Krishna Coomar Bukshi* I L. R, 14 Calc, 147, L R, 12 I A, 123

[7] *De Havilland* v. *Bowerbank*, 1 Camp, 49 See Act XIV of 1882, ss. 209-210.

[8] *Brown* v. *Litton*, 1 P. W., 141. *Diplock* v. *Blackburn*, 3 Camp, 43.

In England "the principle regarding interest appears" says Lord Hatherley, in *Burdick* v. *Garrick*,[1] "to be that the Court does not proceed against an accounting party by way of punishing him for making use of his principal's money by directing rests, or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position as that he is to be presumed to have made, 5 per cent., or compound interest, as the case may be. If the Court finds it is stated in the bill, and proved, or possibly (and I guard myself upon this part of the case) if it is not stated, but admitted on the face of the answer, without any statement on the bill, that the money received has been invested in an ordinary trade, the whole course of decision has tended to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in those cases the Court directs rests to be made." Lord Justice Giffard, as to the point of compound interest said:—"No doubt the principle applicable to that point was very clearly laid down by Lord Cranworth in *Attorney General* v. *Alford*.[2] All that this Court can do as against a defendant in such a case as this by way of penalty is to make him pay the costs of the suit. The question of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made. If he has applied it to his own use, I think it is quite right to say that he ought never to be heard to say that he has made less than 5 per cent., and that that is a fair presumption to make; but if you seek to go further than that, and to charge him with more than 5 per cent., you must make out a case for that purpose."

Mixing principal's funds with his own.—And if the agent mix the property or money of his employer with his own property or money, it lies upon him to distinguish them, and if he fails so to do, the whole will be taken to belong to his principal;[3] for every presumption will be made against him where he makes it impossible for the principal to distinguish his property.[4] And where an agent mixed up his private transactions with those of his principal, and failed to prove that the money was borrowed for the benefit of his principal and her ward, and where the transaction on the part of the lender was found not to be *bonâ fide* inasmuch as he did not satisfy himself that the agent was borrowing for the legal necessity of the ward's estate, he was held personally liable.[5] And even if the agent deposits assets belonging to his principal with bankers on their bank notes carrying interest and the bankers

[1] L. R., 5 Ch., 241.

[2] 4 De G. M. & G., 843.

[3] *Lupton* v. *White*, 15 Ves. 432, (440, 442) see also *Clarke* v. *Tipping*, 9 Beav., 284.

[4] *Armory* v. *Delamire*, 1 Str., 504.

[5] *Juggurnath Roy Chowdhry* v. *Munorakha Dassee*, 2 W. R., 156.

shortly after fail, there being no necessity for such deposit, he will he held liable.[1]

Agent liable to account to principal only.—The agent is, however, liable to account only to his principal; thus where a trustee managed the trust property through an agent, appointed by him, who received the income and held the title deeds of the trust properties in his possession, and the agent was made a party to an information for an account and scheme, the Court held that he was not a proper party, and that he could only be called upon to account to the trustee.[2] So also where the plaintiffs, who were landowners in New Zealand and had offices in Glascow but no office or agency in London, shipped wheat to England for sale in the London market, taking bills of lading in which the wheat was made deliverable to themselves and endorsing these bills to Mathews and Company at Glascow with instructions as agents of the plaintiff to sell the goods in London: and Mathews & Co. having no house or agency in London endorsed the bills over to the defendants who were corn-factors for the purpose of the sale of the wheat; the endorsement in both cases being merely for the purpose of sale and not for the purpose of passing the property; and the defendants effected the sale and paid the proceeds into their own account, and from time to time made remittances to Mathews and Company, who shortly after failed being indebted to the defendants. The plaintiffs then sued the defendants alleging that they (the plaintiffs) through their agents retained and employed the defendants to effect the sales in question and asking for an account; the defendants denied that they were employed by the plaintiffs and contended that they were only accountable to Mathews and Company; *held* that the plaintiffs were not entitled to succeed, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character to the plaintiffs so as to entitle them, the latter, to follow the proceeds of the property in the defendants' hands.[3]

Duty of partners to account —It is similarly the duty of all the partners of the firm to see that accurate accounts are kept of all money transactions of the partnership business, and to allow access to each other to all books of accounts.[4] If no books of account are kept at all, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld, and an account is

[1] *Darke* v *Martyn*, 1 Beav, 525. *Massey* v *Banner*, 1 J. & W., 241. *Fletcher* v. *Walker*, 3 Madd., 73

[2] *Attorney General* v. *Chesterfield (Earl of)*, 18 Beav., 596. See also *Myler* v. *Fitzpatrick*, 6 Madd. & Geld, 360 and *Gibbon* v. *Bukktar Tewaree* 23 W R., 242. Ind Contr. Act, s. 192.

[3] *New Zealand and Australian Land Co.* v. *Watson*, L R, 7 Q. B D., 374.

[4] Ind. Contr. Act, s 257. *Rowe* v. *Wood*, 2 Jac. & W., 558; Lindl., 807. *Taylor* v. *Davis*, 3 Beav., 388, (note).

directed, every presumption will be made against those to whose negligence or misconduct the nonproduction of proper accounts is due ;[1] if however all endeavour to avoid an account, the rule does not hold good.[1] So also a partner must account to the firm for any benefit derived from a transaction affecting or concerning the partnership.[2] Thus he will not be allowed to supply the firm with goods which he has himself bought for his own use at a lower price without informing his partners of the fact.[3] Shortly, it is his duty to refrain from all concealment in the course of the partnership business, and if he obtain or endeavour to obtain a benefit he must account therefor.[4] So also where a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he will be bound to account to the firm for all profits made in such business, and further he must make compensation to the firm for any loss occasioned thereby.[5]

Duty of kurta of joint family to account.—There is a duty imposed upon the kurta of a joint family to account. The principle upon which the right to call for the account rests, is not, as has been supposed, the existence of a direct agency or of a partnership where the managing partner may be considered as the agent for his co-partners ; but it depends upon the right which the members of a Joint Hindu family have to a share of the property. A principle similar to that on which the Court of Equity acts in cases of joint tenants and tenants in common, and not merely in cases of partnership.[6]

Duty of promoters to account.—Although a promoter of a Company cannot be considered an agent or trustee for a Company not being in existence at the time, yet the principles of the law of agency and trusteeship are applicable to his case, and he is accountable for all monies obtained by him from the funds of the Company without the knowledge of the Company.[7]

Duty of factor to account.—Among the most important duties of a factor are those which require him to give to his principal his free and unbiassed use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other persons,[8] and when there have been two factors

[1] *Walmsley* v. *Walmsley*, 3 J. & Lat., 556; Lindl., 808.

[2] Ind. Contr. Act, s. 258.

[3] *Bentley* v. *Craven*, 18 Beav., 75. Kerr on Frauds, 152.

[4] *Rusell* v. *Austwick*, 1 Sim., 52. *Featherstonhaugh* v. *Fenwick*, 17 Ves., 298. *Clegg* v. *Fishwick*, 1 Mac. & G., 294, and *Clegg* v. *Edmonston*, 8 De G. M. & G., 787, all fully referred to in *Lindley on Partnership*, pp. 574, 575, (4th ed.).

[5] Ind. Contr. Act, s. 259. *England* v. *Curling*, 8 Beav., 129. *Burton* v. *Wookey*, 6 Madd., 397.

[6] *Obhoy Chunder Roy* v. *Peareemohen Gooho*, 13 W. R. F. B., 75.

[7] *Lydney and Wigpool Iron Ore Co.* v. *Bird*, L. R., 33 Ch. D., 85.

[8] *Clarke* v. *Tipping*, 9 Beav., 284.

jointly employed and one dies, the survivor is answerable for himself and co-factor [1]

Limitation for suits for an account —The period of limitation for a suit for an account against a factor begins to run during the continuance of the agency when the account is demanded and refused, or where no such demand is made, when the agency terminates [2] Where the account is sought for from an agent for moveable property received by him and not accounted for, the period of limitation runs, during the continuance of the agency, from the time when the account is demanded, but where no demand has been made, from the termination of the agency.[3] Under the Limitation Act of 1871 an agent was held to have refused to account by absconding from his principal; under that Act, the period of limitation for a suit for an account was three years from the time when the account is demanded or refused.[4] Where an agent has not been called upon to render his account, and dies before any demand is so made upon him, a fresh right to an account accrues to the principal as against the agent's representatives, and limitation will not commence to run until administration has been taken out to his estate.[5] And where an agent entered into a registered agreement with a zamindar on the 17th April 1875 to manage the latter's zemindaries for three years, and the agent managed the estate up to the 2nd December 1878, at which date he left India but returned in June 1879 and died in Calcutta on the 26th June, 1879, and his estate was taken over by the Administrator-General The zemindar on the 15th June, 1882 sued the Administrator-General for certain monies alleged to have been received by the agent and which had been unaccounted for, held that the limitation prescribed by Art 116 of Sch. II of the Limitation Act of 1877 was applicable as to such sums as fell within the registered agreement, but as to sums which did not come within the scope of that agreement the limitation of three years applied.[6]

According to English law, there may be cases in which an account between a principal and agent is not barred by the Statute of Limitation, namely, in such cases where the bill is filed against the agent on the ground of his being in a fiduciary relation to his principal; examples of such cases may be found in

[1] *Holtzcomb* v *Rivers*, 1 Ch Cas, 127

[2] Limitation Act of 1887, art. 88, sch. II.

[3] Limitation Act of 1877, sch. II, art 89. *Kallychurn Shaw* v *Dakhee Bibee*, I L R., 5 Calc. 692

[4] *Hurrinath Rai* v *Krishna Kumar Bakshi*, I. L R, 14 Calc, 147 See also under the same act *Horinarain Ghose* v. *Administrator General of Bengal*, 3 C. L. R, 446

[5] *Lawless* v *Calcutta Landing and Shipping Co* I. L. R., 7 Calc, 627 *Burdick* v. *Garrick*, L. R, 5 Ch., (241). See also *Hills* v *Shokhee Monee Dossee*, 10 W. R., 59.

[6] *Hurender Kishore Singh* v. *Administrator General, Bengal*, I. L. R., 13 Calc., 357

Burdick v. *Garrick*,[1] *Foley* v. *Hill*,[2] *Teed* v. *Beere*,[3] *Seagram* v *Tuck*[4] But it appears that this rule does not hold good in India Section 10 of the Limitation Act of 1877 is the section which deals with cases against persons in whom property has become vested in trust for a specific purpose, and enacts that suits against such persons shall not be barred by any length of time; but that section has been held to be especially framed so as to exclude implied trusts or such trusts as the law would infer merely from existence of particular facts or fiduciary relations[5]

Limitation under the Bengal Rent Law—It may here be mentioned that under Bengal Act of 1869, s 30, a suit for an account or papers from an agent must have been brought at any time during the agency or within one year from its determination, or if fraud were alleged within one from the time such fraud became known "[6] But even under that Act a special agreement for taking the account, giving time to the agent to pay, would have had the effect of taking the case out of the section[7] Since the passing of the Bengal Tenancy Act of 1885, the limitation for such suits is however regulated by the Limitation Act, there being no section in the new Act corresponding with section 30 of the old Act.

General rule for India as to duties of directors of Joint Stock Companies—In laying down any general rule for India as to the duties which ought properly to be imposed on the directors of joint Stock Companies the Courts, should be guided by a consideration of English commercial rules and by the current of English decisions so far as they can be suitably applied to a people whose trade is of comparatively recent growth[8]

Duty to give notice to principal of facts material to the agency—The agent should give immediate notice to his principal of any and every fact coming to his knowledge, which may be necessary for the principal to know in order to protect his own interests

Duty of agent dealing in the business of the agency on his own account.—A further duty arising out of the confidence reposed in the agent

[1] L. R., 5 Ch, 233

[2] 2 H. L. Cas., 35.

[3] 5 Jur. N S., 381.

[4] L. R., 18 Ch., D., 296

[5] *Kherodemoney Dossee* v *Doorgamoney Dossée*, I L R, 4 Calc, (465, 469) *Saroda Pershad Chattopadhya* v *Brojonath Bhuttacharjee*, I. L. R, 5 Calc., 910. *Greender Chunder Ghose* v. *Mackintosh*, I. L. R., 4 Calc, 897.

[6] Bengal Act VIII of 1869, s. 30.

[7] *Beer Chunder Manickya* v. *Hurro Chunder Burmon*, I. L. R, 9 Calc, 211.

[8] *New Flemming Spinning and Weaving Co.* v. *Kessowji Naik*, I. L. R., 9 Bom 373, (394), per Scott, J.

by the principal deserves particular notice. And that is that it is his bounden duty not to deal on his own account in the business of the agency, without first obtaining the consent of his principal, and acquainting him with all material circumstances which have come to his own knowledge on the subject; and if he does so, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.[1] The right of the principal where this duty has been abused, has been dealt with by the Courts of Equity in England in numerous cases, and the agent has there been held to stand in a fiduciary position towards the principal.[2]

Concealment of material facts —It is one of the first duties of an agent to disclose all material facts relating to the business of the agency to his principal. And much more therefore it his duty to do so, whenever he proposes to deal in this business of the agency on his own account; for his so dealing on his own account was never intended by the principal on appointing the agent, but rather on the contrary it was on the faith that the agent will act purely and disinterestedly for the benefit of his employer that he was so appointed at all The principle on which this duty is founded, is, that an agent will not be allowed to place himself in a situation, which, under ordinary circumstances, would tempt a man to do that which is not the best for his principal. Thus an agent employed to purchase cannot buy his own goods for his principal, neither can an agent employed to sell purchase for himself his principal's goods, and if they do so, the principal may repudiate such transactions.[3] And neither will he be allowed to purchase for his own benefit.[4] And, as will be seen hereafter, if the principal adopts the transaction, he may claim the benefit of it. But to establish a *primâ facie* case of constructive purchase by an agent out of the funds of his principal, it must be proved that at the time of the purchase, the agent had funds in his hands belonging to his principal, sufficient to meet the purchase, it is not enough to show that the defendant is the agent of the plaintiff, and that he has no funds of his own wherewith to purchase property.[5] Nor may an agent employed to settle a claim buy and enforce it against his principal.[6] So where a

[1] Ind. Contr. Act, s. 215.

[2] *See Tate* v. *Williamson*, L. R., 2 Ch., 55 *Knatchbull* v. *Hallett*, L. R., 13 Ch. D., 696. *Erlanger* v. *Sombrero Phosphate Co.*, L. R., 5 Ch. D., (118), on appeal, L. R. 3 App. Cas., 1218. *Emma Silver Mining Co* v. *Grant*, L. R., 17 Ch. D., 122.

[3] *Bentley* v. *Craven*, 18 Beav., 75. *Ex-parte Dyster*, 2 Rose, 349. *Rothschild* v. *Brookman* 2 Blighs N. S., 165.

[4] *Austin* v. *Chambers*, 1 Cl. & F., 1.

[5] *Meer Sufdur Ali* v. *Woolfut Ali*, 3 W. R., 232.

[6] *Reed* v. *Norris*, 2 My. & Cr., 361.

relative of a young man who was in impecunious circumstances and had sought his relative's advice, was advised by the relative to allow one W, to look into his affairs and to arrange for payment of his debts; and the youth informed W, that he was willing to sell a portion of a freehold estate belonging to him, and after some conversation as to value, W agreed to buy the estate for £7,000, but insisted on the youth consulting his friends on the matter, and an independant solicitor was employed on the youth's behalf. And W, on his part after taking the advice of a mining engineer, discovered that there were valuable mines under the land, which the engineer valued at £20,000, but did not communicate this information to the youth; subsequently the sale was concluded and shortly afterwards the young man died. In a suit brought by his executors to set aside the sale, it was held that the purchaser was placed in a fiduciary position towards the youth, and that it was his duty to have disclosed all material information which he had acquired, and the not having done so, the sale was set aside.[1] So in *Gillett* v. *Peppercorne*,[2] a person employed a broker to purchase some canal shares, and the broker apparently bought them from one Cole, the ostensible owner, but it subsequently turned out that these shares actually belonged to the broker, and that they had shortly previous been transferred into the names of the apparent vendors as trustees for him. After a lapse of several years the employer discovered what had been done, and brought a suit to set aside the transaction. There was no evidence that the price paid for the shares was extravagant, or that any fraud had been practised, and it appeared that the plaintiff was a large proprietor of shares purchased from other persons. The Master of the Rolls said:—"Where a man employs another as his agent, it is on the faith that such agent will act in the matter purely and disinterestedly for the benefit of his employer, and assuredly not with the notion that the person whose assistance is required as agent has himself in the very transaction an interest directly opposed to that of his principal. ..... It is not necessary to shew that fraud was intended, or that loss afterwards took place in consequence of these transactions, because the defendant, though he might have entertained no intention whatever of fraud, was placed in such a situation of trust with regard to the plaintiff that the transaction cannot, in the contemplation of the Court, be considered valid ..... The defendant ought to take back the shares with all dividends which have been paid upon them, with interest at 5 per cent. and the costs of the suit."

Concealment of material facts by promoters.—As will be hereafter seen promoters stand generally in the same position as an agent with regard to this duty to disclose all material facts. In *The Phosphate Sewage Company*

[1] *Yate* v. *Williamson*, L. R., 2 Ch., 55.

[2] 3 Beav., 78. See also *Rothschild* v. *Brookman*, 5 Bli. N. S., 165.

v. *Hartmont*,[1] certain person who were the owners of a concession from a foreign Government combined together to form a Company to purchase the concession, knowing at the time that through their default it was voidable and liable to forfeiture. The owners and others who were the promoters of the Company, fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended Company, and it was transferred to the Company by the trustees, who were to be paid a portion of the purchase money for their share in the transaction. The solicitors for the vendors, who were also the solicitors for the Company concealed the invalidity of the title, and the trustees neglected to require evidence to establish title. The Company brought a suit against the owners of the concession, the promoters, the trustees, the directors, and the solicitors, to obtain repayment of the whole purchase money. Lord Justice James held that the owners and promoters must repay the whole purchase money, and that the trustees who received money in the nature of a bribe for neglecting their duty must repay what they had so received, and as to this last repayment, his Lordship said:—"Commission received by an agent or trustee of a purchaser from a vendor without the knowledge of his principal is in this Court a bribe—it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge." In this country the principal might repudiate the transaction. The rule that the principal may repudiate, where the agent has dealt in the business of the agency without the knowledge and consent of the principal has been held to apply, so that any surreptitious dealing between one principal to a contract and the agent of the other principal, has been held to be a fraud in equity, and which would entitle the first named principal to have the contract rescinded, or to refuse to proceed with it in any shape. Thus where a Telegraph Works Company agreed with a Cable Company to lay a cable, the cable to be paid for by a sum payable when the cable was begun, and by twelve instalments payable on certificates by the Cable Company's engineer, who was named in the contract. And shortly after the contract was entered into, the engineer who was engaged to lay other cables for the Works Company, agreed with them to lay this cable also for a sum of money to be paid to him by instalments payable by the Works Company when they received the instalments from the Cable Company, it was held that under the circumstances, the agreement between the engineer and Works Company was a fraud, which entitled the Cable Company to have their contract rescinded, and to receive back the money which they had paid under that contract.[2]

[1] L. R., 5 Ch. D., 394, (157).

[2] *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.*, L. R., 10 Ch., 515

Concealment of material fact in insurance cases.—Where a master of a ship or other responsible agent, wilfully withholds any information, or by culpable negligence withholds any material fact, it is quite right to hold the owner to be so far identified with the agent as to vitiate a policy.[1]

This duty to act bona fide is construed in England with strictness.—The Courts in England have been most strict in insisting on the agent acting *bonâ fide* towards his principal, and have held that where an agent for sale takes an interest in a purchase negotiated by himself, he is bound to disclose to his principal the exact nature of his interest; and it will not be enough for him merely to disclose that he has an interest, or to make statements such as would put the principal on enquiry, and in such case the burden of proving that a full disclosure was made lies on the agent, and is not discharged merely by the agent swearing that he did so, if his evidence is contradicted by the principal, and not corroborated.[2]

Where the dealings of the agent are disadvantageous to principal.—The case of an agent for sale of an estate colluding with a purchaser, and in consideration of a bribe allowing the purchaser to obtain the estate at less than its value, with a view to a sale at a higher price to a sub-purchaser, the transaction being concealed from the vendor, appears to be met by s. 215 of the Contract Act; that is to say, the principal might repudiate the transaction as being disadvantageous to him; Vice-Chancellor Malins, however, in a case[3] in which such a transaction took place, although the Appeal Court gave no opinion on the point, held that both the agent and the purchaser were severally liable to pay to the vendor the increased amount obtained by the sub-sale. This right of the principal is expressly provided for by section 215 of the Contract Act, and the principal will in such case be able to repudiate the transaction.

Secret gratuities to agents.—Where a party with whom an agent is negotiating on the part of another, agrees to give, or does give a secret gratuity, and that gratuity influences the mind of the agent, directly or indirectly in assenting to anything prejudicial to his employer in making the contract, this is sufficient to vitiate the contract.[4] And an agent receiving such gratuity or commission has been held unable to sue for its recovery, it being immaterial that the principal was not damaged by the agent's conduct.[5]

Principal may claim irregular profits made by agent.—And further, if any profit has resulted to the agent when so dealing without the knowledge

[1] *Proudfoot* v. *Montefiore*, L R, 2 Q B, 511 *Fitzherbert* v *Mather*, 1 T. R, 12. *Stribley* v *Imperial Marine Insurance Co.*, 34 L T. N. S, 281, per Blackburn J.

[2] *Dutton* v *English*, L. R., 18 Eq, 524.

[3] *Morgan* v *Elford*, L R, 4 Ch D, 352.

[4] *Smith* v *Sorby*, L. R., 3 Q B. D., 552, (note).

[5] *Harrington* v. *Victoria Graving Docks Co.*, L. R., 3 Q. B. D, 549.

of his principal on his own account in the business of the agency, such profit can be claimed from him by his principal.[1] For, as says Lord Justice James, "It appears to me very important, that we should concur in laying down again and again, the general principle that in this Court no agent in the course of his agency, in the matter of his agency, can be allowed to make any profit without the knowledge and consent of his principal; that that rule is an inflexible rule, and must be applied inexorably by this Court, which is not entitled, in my opinion, in my judgment, to receive evidence or suggestion, or argument as to whether the principal did or did not suffer any injury in fact, for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an enquiry as that."[2] Thus where the defendant being aware that the plaintiff was desirous of obtaining shares in a certain Company, represented to the latter that he, the plaintiff, could procure a certain number of such shares at £3 a share, and the plaintiff agreed to purchase at that price, and the shares were thereupon transferred, in part to him and in part to his nominees, and he paid to the defendant the price agreed upon, namely, three pound per share, but afterwards discovered that the defendant was in fact the owner of these shares, having just bought them at two pounds a share, it was held that the defendant was in fact an agent for the plaintiff, and that he was bound to pay back to the plaintiff the difference between the price of the shares.[3] This case was followed in *Morison* v. *Thompson*,[4] where the plaintiff authorized the defendant a broker to buy a ship for him from a third person, on the basis of an offer of £9,000, and eventually the ship was purchased through the defendant for £9,250. But prior to the sale, an arrangement had been made between the vendor, and his broker, that if the latter could sell the ship for more than £8,500, he might retain for himself the excess; and it was arranged between the defendant and the vendor's broker, without the knowledge or sanction of the plaintiff, that the defendant should receive from the vendor's broker a portion of such excess, and accordingly the defendant received £225 part of the excess over £8,500. On discovering this, the plaintiff brought an action to recover from the defendant this sum. The jury found that the defendant was the agent of the plaintiff to purchase the ship as cheaply as she could be got, and that the plaintiff could have obtained her cheaper, but for the arrangement between the vendor and his broker. The Court therefore held that the plaintiff was entitled to recover.

[1] Ind Contr. Act, s. 216. *Imperial Mercantile Credit Association* v. *Coleman*, L. R., 6 H. L., 189.

[2] *Parker* v. *McKenna*, L. R., 10 Ch., 96, (124). See also *Hay's Case*, L. R., 10 Ch., 593, (601).

[3] *Kimber* v. *Barber*, L. R, 8 Ch, 56.

[4] L. R., 9 Q. B., 480.

So where an agent affected an insurance for his principal, and in so doing received a receipt for the full amount due, but received from the Insurance Company, a reduction of 10 per cent. which represented the usual allowance made by the Insurance Company to merchants and others for introducing insurances where the praemium is paid within a given time, *held* that he was bound to pay over the amount to his principal [1] So where the plaintiff became the owner of a house by reason of the death of his brother, by whom the defendant had been employed as his solicitor. The defendant was at that time in negotiation with B. a person who wished to obtain a lease of the house in question, and received from him £50 on the terms of the following document, "In consideration of £50 paid to me by B, I agree to pay B, £100 if the heir-at-law does not execute the lease to B, within a reasonable time." The plaintiff acting under the defendant's advice, executed the lease to B, but on learning what had taken place, sued the defendant to recover the £50. The Court (Lord Esher Fry L. J., and Lopes L. J.,) found that the defendant whilst acting as the plaintiff's solicitor had in effect made a bet with the other party to the negotiation, a transaction which must have inevitably disabled him from giving proper advice to his client, and held that the plaintiff was entitled to recover [2] And this principle applies with equal force to the relation of vakeel and client.[3] And under this rule would fall the case of a promoter of a Company making a gift to a director, whilst there are any questions open between the Company and the promoter; and it has been held that where such is the case, the gift must be accounted for by the director to the Company, and the latter have the option of claiming the thing given, or its highest value whilst held by the director.[4] The case of the army agent making a profit out of the tradesmen supplying an outfit for an officer would fall under that section, 216 of the Contract Act, there the plaintiff, residing in India, employed the defendant, an army agent and accoutrement maker, as her agent in England, and authorized him to provide her son, who was about to proceed to India as a cornet, with a reasonable outfit, and accordingly the articles composing such outfit were paid for through the defendant; but the tradesmen allowed him a discount off the invoiced prices having increased their prices with reference to such allowance, while the defendant charged the full price against the plaintiff, alleging that this was the universal practice as between army agents and tradesmen; but of this practice the plaintiff had no actual knowledge. James V. C., held that the defendant was bound to account to the plaintiff for the discounts allowed to him [5]

[1] *Queen of Spain* v. *Parr*, 39 L. J. Ch., 73.

[2] *Burrell* v. *Mossop*, 12 Ind. Jur., 279.

[3] *Fuzeelun Beebee* v *Omdah Beebee*, 10 W. R, 469

[4] *Eden* v. *Ridsdale Ry. Lamp and Lighting Co*, L. R, 23 Q. B. D., 368

[5] *Turnbull* v. *Garden*, 38 L. J Ch., 331

Agent making profit by sale to himself.—In *De Bussche* v. *Alt*,[1] the plaintiff in the year 1868 consigned a ship to Messrs Gilman & Co, in China for sale, fixing a minimum price of 90,000 dollars and requiring cash payment. Messrs. Gilman & Co., with the plaintiff's knowledge and consent, employed the defendant to sell the ship in Japan with the same instructions The defendant being unable to effect a sale on the terms mentioned, bought her himself for 90,000 dollars, and at about the same time re-sold her to a Japanese prince for 160,000 dollars payable 75,000 dollars in cash, and the remainder on credit. The plaintiff was not informed that the defendant had purchased the ship himself, or that he had re-sold it till, June 1869, after the transaction was completed. The defendant paid over 90,000 dollars to Messrs Gilman & Co., who remitted it to the plaintiff. The plaintiff filed a suit to compel the defendant to account for the profit made by him in the re-sale of the ship—held, that the relation of principal and agent was established between the plaintiff and the defendant and existed at the time of the purchase and re-sale of the ship by the defendant, and that he was therefore liable to account to the plaintiff for the profit made by him in the transaction.

Where the rule that agent must account for secret profits does not apply—The rule laid down in the *Queen of Spain* v. *Parr*[2] is referred to as being correctly laid down in the *Great Western Insurance Company* v. *Cunliffe*,[3] but this latter case shows that the rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension, but not misinformed as to its actual extent. There, a Marine Insurance Company in New York appointed a firm of merchants in London as their agents for settling claims in England and for effecting re-insurances, for settling claims the agents were to receive a fixed percentage, but no provision was made for payment for re-insurance. But according to the custom as between underwriters and brokers, the agents were allowed by the underwriters 5 per cent. on each re-insurance; and also at the end of the year, on the general balance between the underwriter and the broker 12 per cent on the profits of the year, if there were profits. The firm in London were in the habit of receiving both these percentages, but only the 5 per cent was mentioned in their accounts sent to the Insurance Company The Company discovered this in 1866, but made no objection to it until 1868; and in 1869 filed a bill against the agents for an account in which the 12 per cent. should be accounted for—held that the agents were entitled to retain the 12 per cent., as it was not a payment, upon any particular transaction, but upon the whole result of transactions which the broker had introduced to the particular underwriter during the year. that having dis-

[1] L. R, 8 Ch. D., 286. [2] See *ante*, p. 314. [3] L R, 9 Ch App, 525.

covered that the profit was made in 1868, the plaintiffs should have stopped it at once; and not have gone on dealing for two years without making an objection. Sir G. Mellish L. J., said:—"It is quite obvious that they must have known, and they do not deny that they did know, that the agents were to be remunerated by receiving a certain allowance or discount from the underwriters with whom they made the bargains. It was easy to ascertain by inquiry what was the usual and ordinary charge which agents who effect re-insurances are entitled to make. If a person employs another, who he knows carries on a large business, to do certain work for him as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the others persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary amount which agents are in the habit of charging."[1]

It is not the essence of a title to relief to recover from an agent profits received by him that the principal would have been able to claim as his own money, as between himself and the other party to the transaction, the money secretly received by the agent—The money sought to be recovered from the agent as secret profit, must be money had and received by the agent for the principal's use; but the use which arises in such a case, and the reception to the use of the principal which arises in such a case, does not depend on any privity between the principal and the opposite party with whom the agent is employed to conduct the business; it is not that the money ought to have gone into the principal's hands in the first instance; the use arises from the relation between the principal and the agent himself It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity,—as between the principal and agent, that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity.[2]

Partners bound to account for benefit derived from transactions affecting partnership business.—A partner is bound to account to the firm for any benefit derived from a transaction affecting the partnership.[3] This rule stands on the same foundation as that by which an agent is bound to

[1] See also *Baring* v. *Stanton*, L. R., 3 Ch. D., 502

[2] *Boston Deep Sea Fishing and Ice Co.* v. *Ansell*, L. R., 39 Ch. D., (369).

[3] Ind Contr Act, ss 257, 258

account to his principal for profits, for each partner is agent of the others to act within the scope of the partnership business Good faith requires that no partner should be at liberty to obtain any private advantage at the expense of his partners [1] This rule has already been exemplified when dealing with the question of secret profits,[2] some few further cases on this point are noted below [3]

Promoters are bound by the same rules —Although a promoter of a Company cannot be considered an agent or trustee for the Company, the Company not being in existence at the time, yet nevertheless the principles of the law of agency and trusteeship are applicable to his case, and he is accountable for all moneys obtained by him from the funds of the Company without the knowledge of the Company [4] And will be bound to disclose the fact that he is selling his own property to the Company [5] And where he has an interest he should declare what that interest is [6]

Promoters stand in a fiduciary position to a Company —"A promoter is, says Lord Justice James in *New Sombrero Phosphate Co* v *Erlanger*,[6] "according to my view of the case, in a fiduciary relation to the Company which he promotes or causes to come into existence If that promoter has a property which he desires to sell to the Company, it is quite open to him to do so, but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent" And in the Court of Appeal,[7] the Lord Chancellor says —"Promoters stand in my opinion undoubtedly in a fiduciary position. They have in their hands, the creation and moulding of the Company, they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation If they are doing all this in order that the Company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion incumbent upon the

[1] Lindley, p 571

[2] *Ante*, p 312

[3] *Gardner* v *McCutcheon*, 4 Beav, 534. *Bentley* v *Craven*, 18 Beav, 75. *Dunne* v *English*, L R, 18 Eq, 524

[4] *Lydney Wigpool Iron Ore Co* v *Bird*, L R, 33 Ch D, 85 *Beck* v *Kantorowicz*, 3 K & J, 230 *Emma Silver Mining Co* v *Lewis*, L R 4 C P D, 396 *Bagnall* v *Carlton*, L R, 6 Ch D, 371 *Whaley Bridge Calico Printing Co* v *Green*, L R, 5 Q B D, 109

[5] *Erlanger* v *New Sombrero Phosphate Co*, L R, 3 App Cas, 1218.

[6] L R, 5 Ch D, 73, (118)

[7] *Erlanger* v *New Sombrero Phosphate Co*, L R, 3 App Cas, 1218, (1236) See also *Emma Silver Mining Co* v *Grant*, L R, 17 Ch D, 122 *Bagnall* v. *Carlton*, L R, 6 Ch. D, 371; but see the remarks of Cotton L J, at p 407

promoters to take care that in forming the Company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint Stock Company, and then sell his property to it, but I do say, that if he does he is bound to take care that he sells it to the Company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other persons." In *The Emma Silver Mining Company* v. *Grant*,[1] under a secret arrangement between the vendor of a mine and the defendant a financial agent who was promoting and afterwards formed a Company for its purchase, Grant received from the vendors part of the purchase money without the knowledge of the Company. In a suit by the Company to make Grant liable for the amount of the secret profit he had so made, held that the Company was entitled to recover all such profit, but that in estimating the profit, Grant was entitled to be allowed all sums *bonâ fide* expended in securing the services of the directors and in payments to brokers and to the press &c. The Master of the Rolls in delivering judgment said:—"The moment a man is in a fiduciary position, however that fiduciary position may arise, before he can retain a profit to himself, he must deal with his principal on the footing of making a full and fair disclosure of everything material in relation to the dealing or transaction in which he acts in the fiduciary capacity."[2] The cases in which promoters of a Company, and solicitors of projected Companies, obtained secret benefits at the expense of the Company, are not very numerous, but in the following cases it will be found that they have been bound to make a refund, *viz.*, *Emma Silver Mining Company* v. *Lewis*,[3] *Whaley Bridge Calico Printing Company* v. *Green*,[4] *Tyrrell* v. *Bank of London*,[5] *Spence's Hotel Company* v. *Anderson*.[6] And the cases[7] as to directors are to the same effect. Agents employed by vendors to form and launch a Company are not necessarily promoters; but no doubt a very little will make people promoters of a Company, if it can be seen that they are really doing something in the way of speculation for their own interest, and not acting merely as agents for others.[8]

[1] L. R., 11 Ch D., 918; L. R., 17 Ch. D., 122.
[2] L. R., 11 Ch. D., (937).
[3] L. R., 4 C. P. D., 396.
[4] L. R., 5 Q. B. D., 109.
[5] 10 H. L Cas., 26.
[6] 1 Ind. Jur., 295, 307.
[7] *McKay's Case*, L. R., 2 Ch D., 1, *Madrid Bank* v. *Pelly*, L. R., 7 Eq., 442.
[8] *Lydney* v. *Wrypool Iron Ore Co.* v. *Bird*, L. R., 31 Ch. D., 328.

No difference between profits made after agent is appointed, and profits through bargains made at the time he becomes an agent.—This proposition is laid down by Sir G. Mellish in Hay's case[1] His Lordship there stated that there was in his opinion no difference between a profit made by an agent after he has become an agent, and profit through a bargain made by him at the time when he becomes an agent—a bargain made, not with his principal, but with a person who is proposing to enter into a contract with the principal. And this appears to be so also under the Contract Act, as the profit is made after the agency has been entered into, although the bargain be settled previously

When agent may deal in business of the agency on his own account—There is, however, nothing to prevent an agent from dealing in the business of the agency on his own account, if the principal consents to his so doing after a full disclosure of all material facts; or after the agent has pointed out the advantages and disadvantages of the position, and the principal consents to the proposed transaction.[2] And this even when he does not disclose when the transaction takes place, but does so afterwards, and the transaction is adopted by the principal.[3]

Case in which there had been a full disclosure—Where there has been a full disclosure of all material facts, the principal cannot put in a claim to any profit made by the agent Thus where two brothers C and W S Black, two of the directors of a Coal Company, called the Chesterfield Company, bought an adjoining colliery for £53,000 on their own account. intending to bring out a limited Company with the object of re-selling it at a profit; for this purpose they employed one Smith a broker who had assisted in bringing out the Company in which the two brothers were directors, and who was at that time Secretary of the Company Smith suggested that they should offer it to the Chesterfield Company, and this was done at a board meeting, where the two Blacks stated their willingness to sell to the Company for £100,000; the Board caused the property to be valued and reported upon, and it was valued at £175,000; this valuation and report were discussed by the Board of Directors, the Blacks being absent; in order that there might be a valid sale to the Company, as was advised, W S. Black resigned his directorship and agreed to purchase from C. Black his moiety of the colliery, and thus become the sole vendor to the Company. C. Black continued to be a director of the Chesterfield Company · and as between the brothers, W S. Black agreed to purchase C Black's interest in the colliery at half the price that the Company should give him for the colliery The board of directors after full investigation into the state and position of

[1] L R, 10 Ch, 593, (602)

[2] See *O'Rorke* v. *Bolinbroke*, 25 W. R (Eng.), 239

[3] *In re Cape Breton Co*, L R., 29 Ch. D, 795, (811)

the colliery were authorized to purchase at £100,000. The purchase was subsequently completed, at which time the directors and shareholders knew, that the brothers Black had been jointly interested in the original purchase of the colliery, that C. Black had sold his interest to his brother, and that a profit was being made on the re-sale to the Company, but they did not know at what price the brothers had purchased, nor was any enquiry made on this head. Two years after the purchase the Company commenced an action against the two brothers alleging that the sale by C. Black of his interest in the Colliery to his brother was a mere contrivance to give an assumed validity to the sale, and that C. Black had concealed his real interest in the colliery at the time of the sale to the Company, claiming an account of the profits made by the brothers on the re-sale and payment accordingly—held that the Blacks, in stating to the Company, that they were the purchasers and vendors of the colliery, had made a full and fair disclosure of their interest, that they had sufficiently put the Company at arm's length; that they were not bound to disclose the price they had given for the colliery; that there had been no misrepresentation or concealment of any material fact, and that the Company were not therefore entitled to their claim.[1] The decision last mentioned was affirmed in *Cavendish Bentinck* v. *Fenn*.[2]

Onus of proof of mis-feasance.—As to on whom the *onus* of proof of the dishonest concealment of material facts lies, there appears to be a distinction drawn between cases in which rescission of the contract is claimed, and applications made under the Companies Act to establish a case of mis-feasance. This question is gone into the case of *Cavendish Bentinck* v. *Fenn*,[11] in which case Lord Herschell draws the distinction as to the *onus* of proof of establishing mis-feasance between a case of mis-feasance sought to be established by an applicant under the Companies Act, section 165, (Ind. Companies Act, s. 214) and a case in which the principal seeks to rescind a contract for misfeasance. For, as says his Lordship "There is no mis-feasance in a person who has an interest in the property, by being a shareholder in the Company which is selling it, nevertheless acting as a director in the purchase of that property for another Company. The mis-feasance, if any exists at all, must be in this, that he enters into such a transaction without communicating to his co-directors the fact that he has such an interest. It seems to me that it must rest with those who allege the mis-feasance to prove that element, which is an essential element to make out mis-feasance at all." Section 111 of the Evidence Act, however, lays down that where there is a question as to the good faith of a transaction between parties, one of whom stands in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in the position of active confidence.

[1] *Chesterfield and Boythorpe Colliery Co.* v. *Black*, 37 L. T. N. S., 740.

[2] L. R, 12 App. Cas., 652.

LECTURE X.

PART I. LIABILITY OF AGENT TO PRINCIPAL.

Agent liable for neglect, want of skill and misconduct—Not for loss or damage indirectly or remotely caused by neglect, want of skill, or misconduct—Measure of damages is the actual loss—Measure of damages on omission to procure insurance—Measure of damages under the Company's Act—The damage must be the necessary result of agent's neglect—Must not be too remote—Right to nominal damages—This latter right does not apply to cases under s. 165 of Company's Act—Plaintiff cannot remodel his case for damages—Adoption of contract by principal puts an end to his right against the agent for breach of duty—Liability for acts of sub-agent—Not liable for refusing to make bets on behalf of principal—Liability of directors for negligence—Liability of a commission agent—Defences of agent against these liabilities—But cannot dispute principal's title. When *jus tertii* may be set up. Not where third person being aware of the circumstances has abandoned his claim—True ground on which the right is based—Rule as to *jus tertii*.

Agent liable for neglect, want of skill and misconduct.—In treating of the different duties of the agent, it has been seen that the agent renders himself liable for any neglect, want of skill or misconduct in carrying out his duties; and inasmuch has his liability to his principal arises only out of his neglect, want of skill or misconduct, it is unnecessary to give further examples of breaches of his duty which entail a liability. It will be, therefore, sufficient to state that he is answerable to his principal for the direct consequences of his neglect, want of skill and misconduct, but not in respect of loss or damage which is indirectly or remotely caused by his neglect, want of skill or misconduct.[1]

Measure of damages—The actual loss furnishes the measure of the damages he is liable for; and this may vary according to the time at which the action is brought.[2] Thus in *Charles* v. *Altin*,[3] where under a charterparty, the charterers were liable to pay one-third of the freight in advance, to be returned, however, if the vessel did not reach her destination, the charterers to insure the amount at the owner's expense, and deduct the costs of so doing from the first payment of freight. The vessel never arrived, and the charterers sued for a return of freight. The owners contended that if the insurance had been properly effected, it would have indemnified them against the loss of the one-third freight stipulated to be returned, but that by the negligence of the charterers in deviating from the usual course of business in effecting the insurance, the insurance had become worthless; and consequently that the defendants had a right of action

[1] Ind. Contr. Act, s. 212. [2] Mayne on Damages, 471. [3] 15 C. B, 46.

against the plaintiffs to exactly the same amount as that which the plaintiffs had against them. Maule J., said:—"That which is complained of in the plea would give the defendant a right of action against the plaintiffs as soon as they were guilty of the negligence charged, and the defendant was thereby damnified. That which happened subsequently does not necessarily determine the amount of damages the defendant would be entitled to. A jury might have given exactly the same amount of damages before as after the loss. The question is, what damage has the party sustained at the time the cause of action vested in him If nothing had happened, and a policy might then have been effected, the jury would consider what was probable; if the loss had then happened, they perhaps might have given the full amount; but they were not bound to do so, there were a variety of circumstances, which they might properly take into their consideration. Therefore it is not a necessary and conclusive thing that the sum to be insured by the policy, neither more nor less, is the sum which the plaintiffs would have to pay; but a compensation for the injury resulting from their negligence" Jervis C.J., as to the actual loss being the measure of damages, said:—"It is not laid down that the broker, if guilty of negligence in effecting the insurance, becomes himself an insurer, and liable to pay the exact amount for which the insurance was, or ought to have been effected, less the amount of praemium. If so, what is the praemium, which as a matter of law is to be deducted? It clearly must mean that the amount of the loss is the *reasonable* not the ascertained *legal* measure of damages which the party is entitled to." So in *Cassaboglou* v *Gibbs*,[1] the defendants were commission agents in Hongkong to whom the plaintiff a London merchant gave orders for the purchase of a certain kind of opium, and the defendants upon such order purchased and shipped to the plaintiff opium which they erroneously supposed to be of the description ordered, but which was really of an inferior description. The plaintiff sought to recover as damages in an action against the defendants the difference between the value of the opium ordered and that of the opium actually shipped by the defendants, on the ground that the relation between the defendants as commission agents and himself was that of vendor and vendee of the opium. Watkin William J., said.—"The plaintiff is not entitled to recover from the defendants anything beyond his actual loss. The plaintiff employed the defendants as his agents to purchase the opium for him, and their duty was to use due care, skill and diligence, in executing his orders, and for their failure in this respect they are liable to the plaintiff for all loss and damage sustained by him through their omission and negligence. The plaintiff seeks to treat them as vendors of the opium to him, and to hold them responsible for damages as for a breach of warranty of the kind and quality of the goods, in which case the measure of damages would not be merely the

[1] L R, 9 Q. B D., 220.

difference between the cost to him of the goods and their real value, but the difference between the value of the goods of the description sold and of the goods actually sent. A single illustration is sufficient to show the fallacy of the plaintiff's contention: suppose one instructs a commission agent to purchase for him a very valuable original picture if it should be offered for sale, and the agent carelessly bids for a picture under the belief that it is the original, and it is knocked down to him for say £100, and he informs his employer that he has bought the picture for that sum and his employer remits the money and the picture is forwarded, but upon arrival is discovered to be merely a copy, the employer rejects the picture and it is sold for £90. Now suppose that if it had been the original, it would have been worth £1,000. Is the agent liable for £910 damages, or only for the actual loss caused to his employer through his want of care and skill. It seems to us that the latter is the true measure of damages." On appeal *Cassaboglou* v. *Gibb*,[1] this rule was approved, Brett M. R., saying:—"It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and purchaser for the purpose of settling the damages for the breach of duty of the agent." Fry L. J., said: "Was the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact, and as a matter of fact there was no such contract.....It that be so, then is the principle on which the damages are to be assessed to be governed by that which is applicable to the case of where there exists such a contract? I think not, and that it is to be governed rather by that which is applicable to the case of principal and agent." So where certain merchants in London received from a mere stranger residing abroad a bill of lading of certain goods in a letter requesting them to effect an insurance; but they, declining to act, but with a view to his interests endorsed over the bills to a friend who afterwards received the goods, and failed with the proceeds in his hands, it was held that the merchants by endorsing the bills of lading were liable to the consignor for the value of the goods.[2]

Measure of damage on omission to procure investment.—The case next to be cited is a further instance of the rule that it is only the actual loss which can be claimed as damages; it is, however, also one illustrative of the peculiar position of a solicitor as an agent, and as an officer of the Court. In *Batten* v. *Wedgwood Coal and Iron Company*,[3] an order was obtained by the solicitor for the plaintiff that the purchaser of property, sold under an order of the Court in an action, should pay his purchase money into Court, and that the money, when paid in, should be invested in consols. The plaintiff had the conduct of the sale The money was paid into Court by the purchaser, but the

[1] L R., 11 Q B. D., 797. [2] *Corlett* v. *Gordon*, 3 Camp., 472. [3] L R., 31 Ch. D., 346.

plaintiff's solicitor omitted to leave with the paymaster the necessary request for its further investment, and consequently the investment was not made. On the further consideration of the action, it was ordered that the balance of the purchase money, after the payment of certain costs, should be paid to the Receiver in the action, in part satisfaction of a balance due to him. The carriage of the order was given to the Receiver, and he then discovered that the purchase money had not been invested. He then took out a summons asking that the plaintiff's solicitor might be ordered to pay to him the amount of interest lost by the non-investment of the purchase money:—The attorney was not solicitor to the Receiver. It was contended on the part of the solicitor that he was only responsible to his client, and that she had suffered no damage; and that as consols had fallen since the date of the order, he, at all events, was entitled to a deduction to the extent of the fall. Pearson J. said:—"I do not agree with the contention that Mr. Musgrave (the solicitor) is not liable except to his own client. The conduct of the sale rested with him because he was the solicitor of the plaintiff, and as such he was discharging the duty which devolved upon him, and no other solicitor would have been entitled to charge for that which he was doing. But he was acting as an officer of the Court, and in that character, I conceive, he was liable to the Court for the due discharge of his duty ..... I think therefore that he is liable to make good to the Receiver the loss of interest which has resulted from the non-investment of the money. But inasmuch as the price of consols fell in the interval between January and November 1884, Mr. Musgrave is entitled to set off the gain which has resulted from that fall against the loss of interest occasioned by the non-investment. The Receiver is *only entitled to be recouped what he has actually lost.*"

As to the measure of damage on the breach of a warranty in a charterparty entered into by agents for an undisclosed principal, in a case decided previously to the passing of the Contract Act *see Schiller* v. *Finlay.*[1]

Measure of damages under s. 214 of the Companies Act.—The measure of damages where an officer of a Company has been guilty of mis-feasance, and has been called upon to contribute under s. 165 of the English Companies Act (Ind. Comp. Act, s. 214), has been discussed in McKay's case.[2] There, the owner of a mine by an agreement adopted by a Company agreed with McKay, acting on behalf of the Company, to sell the mine to the Company for a price partly in cash and partly in paid-up shares. By another agreement not known to the Company, the vendor was to give McKay for his trouble 600 of the paid-up shares. The Company was formed, and whilst McKay was secretary to the Company the shares were allotted to the vendor, and transfers of 600 of them by the vendor to McKay were prepared. These shares were afterwards trans-

[1] 8 B. L. R., 544. [2] L. R., 2 Ch. D., 1.

ferred to McKay, and 500 of them remained in his hands when the Company was ordered to be wound up, *held* that McKay was a wrongdoer, and therefore in estimating the damages, a presumption might be made against him which could not be made against a person who was not a wrongdoer; a considerable number of shares were taken by solvent persons though a great many were allotted to persons who proved insolvent; held that it was the duty of the directors to see that the shares were taken by solvent persons, and it being impossible to assume, in favour of a wrongdoer, that the persons who might otherwise have taken these shares would have been insolvent, it was to be assumed that these shares could have been disposed of for their full value. The full value of the shares therefore was given. Brett J., said: "There is no fixed legal rule to determine the amount of the damages. Of course he cannot be ordered to pay any damages which are not consequent on this act, but he can be ordered to pay the largest amount of damages that could at any time have been incurred. This may be said to be the full value of the shares as it may be assumed that they might have been allotted to a solvent holder, who would have paid for these shares if McKay had not had them."

The damages must be the necessary result of the neglect.—Further the damages must be the necessary result of the agent's neglect. Thus in a case cited by Mr. Mayne, where the plaintiff had been nonsuited in an action against the underwriters on the ground of concealment of material information, and claimed in the suit against his agent to include the cost of the action on the policy; Lord Eldon said there was no necessity to bring that action to enable the plaintiff to recover, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the agent, he ought not to be charged with the costs of it.[1]

Damages not to be too remote.—Such damage must not be too remote or indirect, but must be the proximate and natural result of the agent's neglect, want of skill or misconduct Thus in *Robert and Charriol* v. *Isaac*,[2] the plaintiffs chartered a ship of the defendant, and by the charterparty it was stipulated that the said ship being tight, staunch, and strong should receive from the plaintiffs a full cargo of rice, and when loaded should proceed to St. Denis, the penalty for the non-performance of the charterparty being the estimated amount of freight. The plaintiffs began to load in May and had nearly finished when it was discovered in June that the ship was leaking, and in consequence of this, the cargo had to be shifted; and a portion of it having been found to be damaged had to be replaced after the leak was stopped. The charge for shifting and the cost of the substituted cargo was paid by the defendant. Considerable

[1] *Seller* v. *Work*, Marsh. Ins, 243, (4th Ed.). *Mayne on Damages*, 472.

[2] 6 B. L. R. App., 20.

delay occurred in consequence of the leak, and the cargo was not fully stowed until the end of July In May when the plaintiffs had loaded a portion of the cargo, and had obtained bills of lading, they drew bills of exchange at 60 days' sight for the value of the cargo covered by the bills of lading on their agent at St. Denis, which they sold to the Comptoir D'Escompte de Paris, hppothecating the cargo for the amount of their draft. Other similar drafts were subsequently drawn and sold When the plaintiffs received notice of the leakage, they, in anticipation of delay, arranged with the Comptoir D'Escompte de Paris that the bills should not be forwarded forthwith, but should be held by the Comptoir D'Escompte, and renewed by the plaintiffs on the completion of the loading, the plaintiffs paying interest on the bills in the meantime at 9 per cent. per annum. On receiving the bills, the plaintiffs in consequence of the difference in the rate of exchange were out of pocket Rs. 400. And in a suit against the owner for breach of the charterparty in not supplying a tight ship, they sought to recover, as damages arising out of such breach, the interest paid by them on the drafts in pursuance of their arrangement with the Comptoir D'Escompte, the sum they had to pay on renewing the bills, a further sum for interest on the bills which they could not negotiate in consequence of not being able to obtain bills of lading from the defendant, and the value of the stamps on the bills which had been cancelled in consequence of the plaintiff's arrangement with the Comptoir D'Escompte. Phear J., said: "It is obvious that the damages which these sums represent, are not damages which necessarily follow from the circumstance that the ship was not staunch and strong, and they, therefore, cannot be fastened on the owner of the ship as a consequence of his breach of the charterparty in this respect, unless some other fact be added to connect them with it. As I understand the case ..... the plaintiffs say that the fact of the ship not being staunch and strong caused a delay in the loading, and that it was a necessary consequence of this delay that the charterers should be obliged to stay the forwarding of any drafts which they might have drawn against the cargo, and to renew them if the time of the renewing of those drafts expired, or threatened to expire, during the delay, and therefore that the owners of the ship are bound to pay to the charterers all the costs which have resulted from their taking this course. Now it seems to me that there is nothing whatever stated, from the beginning to the end of the case, which would justify the inference that the owners of the ship executed the charterparty in view of a course of proceedings of this kind, and there is certainly nothing in the contract of charterparty generally from which the owners must be presumed to expect that the charterer *qua* charterer would, in the ordinary course of business, be involved in the transactions out of which the plaintiff's losses arose. I will say further that there is nothing in the case to show that there was any necessity, or even expediency, other than the cir-

cumstances of his own affairs, which would oblige the charterer, after he had actually drawn against the cargo, from delaying to forward his bills and shipping documents to their destination. ..... In short I can find nothing.....to indicate the slightest ground upon which the owners of the ship should be made liable to recoup the charterer the particular losses for which the plaintiffs here sue, as being in any way a proximate consequence of the temporary want of seaworthiness of the ship."

Right to nominal damages.—The principal has a right to nominal damages for his agent's neglect; this point was decided in *Van Wart* v. *Wooley*,[1] where A and Company resident in America employed their agents who resided at Birmingham to purchase and ship goods for them. On account of such purchases they sent to their agent a bill drawn by Cranston and Company in America on Grey and Lindsay in London payable at 60 days after sight to the order of the plaintiff, but did not endorse it. The agent employed his bankers to present the bill for acceptance; Grey and Lindsay refused to accept, but of this the bankers did not give notice until the day of payment when it was again presented and dishonoured. Before the bill arrived in England, Cranston and Company became bankrupt, and they had not, either when the bill was drawn, or at any time before it became due, any funds in the hands of the drawee. In an action by the agent against the bankers for neglecting to give him notice of the non-acceptance of the bill, Abbott C. J., *held* that inasmuch as A and Company, not having endorsed the bill, were not entitled to notice of dishonour, and still remained liable to the agent for the price of goods sent to them, and the drawer was not entitled to notice as he had no funds in the hands of the drawee, the agent could not recover the whole amount of the bill, but such damages only as he had sustained in consequence of his having been delayed in the pursuit of his remedy against the drawer, as to this question of loss Abbott C. J., said:—"The amount of this loss has not been inquired into or ascertained. Perhaps it may be merely nominal; but even if it be so, the plaintiff was entitled to a verdict for nominal damages. In order therefore to do justice between these parties, the cause must be again submitted to a jury." A rule was accordingly drawn up for a new trial. On the new trial it was admitted that the plaintiff had in the meantime recovered from A and Company, the amount of the bill with interest. It was contended therefore that there was no injury. Lord Tenderden C. J., said: "Every man employing another to present a bill for him is entitled to notice from that other of its dishonour. If he does not receive that notice, he suffers damage, though he may ultimately receive the amount of the bill, and he is therefore entitled to a verdict."[2] But this doctrine does not apply to an application under the 165th section of the

[1] 3 B. & C., 439. [2] M. & M., 520.

Companies Act, (Ind. Companies Act, s. 214). For, the right which that section gives is not given to a Company, or the representatives of a Company with whom there is a contract, or as towards whom there is a duty, or as regards whom there is a breach of duty; but the right under that section is given to "any liquidator or any creditor, or contributory of the Company", and there is no duty, or breach of duty to the Company in respect of which a creditor or contributory can maintain an action, but he has a right to this extent, that if, owing to a mis-feasance or breach of duty, the funds of the Company in which he is interested have been diminished, those funds shall again be made good, and the assets of the Company shall be recouped the loss which they have sustained "[1]

Plaintiff cannot remodel his case for damages.—Where a plaintiff prefers a claim against another for damages on account of negligence, and it is possible that the Court may take one or more different views as to the proper measure of damages, the plaintiff must come prepared with evidence as to the amount of damages according to whichever view the Court may adopt, and if the evidence produced is applicable to one view only, the Court will not give the plaintiff a re-trial and allow him to remodel his case.[2]

The adoption of a contract by a principal puts an end to his right against the agent for breach of duty.—Although, where an agent, before accepting the agency has an interest in property which subsequently formed the subject matter of the agency, and during his agency sells that property to his principal without disclosing his interest, the principal might at his option repudiate the transaction, yet if the option which the principal had, is exercised by confirming the contract with knowledge of all facts, it appears that the agent cannot be made liable for the transaction Thus, where one Fenn who was the agent of a Company to purchase a specific property in which, before the commencement of his agency, he had acquired an interest, purchased that property for the Company without disclosing to the Company his interest therein, but after the purchase the fact was fully disclosed, and with the knowledge so acquired the Company elected to retain the property, it was held that no relief could be given as against him, as when he acquired his interest in the property he was not a trustee for the Company and could not be treated as having purchased it on behalf of the Company at the price he gave for it, and therefore was not chargeable with the difference between the price at which he bought and the price paid by the Company, and could not be charged with the difference between the price paid by the Company and the value of the property when the Company bought it, as that would be making a new contract between the

[1] *Cavendish Bentinck* v. *Fenn*, L. R, 12 App. Cas., (662).

[2] *Anunda Lall Dass* v. *Boycaunt Ram Roy*, I. L. R., 5 Calc., 283, *per* Garth C. J.

parties.[1] Lord Justice Fry in that case, said:—"This case is not the case of an agent who, after he has accepted the agency, has acquired property, the purchase of which was within the scope of his agency, and then has re-sold that property to his principal at a larger sum, in which case it is obvious that the principal may say that the original purchase by the agent at a smaller price was a purchase on behalf of the principal. Nor is this the case of a man who accepts an agency to buy some article in the market, and then sells to his principal his own goods, in which case it may be that the agent is liable for not performing his agency by purchasing in the market, supposing it was possible for him to do so. This case is distinguished from that, by there being a direction to buy a specific property Nor again, is this the case of an agent who, by any subsequent acts of his own, has rendered the rescission of the contract by his principal impossible I express no opinion whether or no, in that case, the principal would have a right against the agent, notwithstanding the non-rescission of the contract. This is a case in which the agent, before accepting the agency had an interest in the property, and during the agency sold that property to his principal without disclosing his interest. That in such a case the principal would have a right to rescind there can be no doubt The option which the principal had, has in this case been exercised by confirming the contract with knowledge of the facts, and the question is whether, after that affirmance, the agent is liable in any sum to his principal. There is no authority which determines this point, and it therefore, is to be determined upon principle. ..... I think that the case is one in which the adoption of the contract by the principal puts an end, and ought to put an end, to any further rights against the agent It appears to me that to allow the principal to affirm the contract, and after the affirmance to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and, however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent on some ground which, I confess I do not understand. It is said that, notwithstanding the ratification of the contract, the principal may claim some profits from the agent because those profits were made surreptitiously or clandestinely It appears to me that the answer to that is this, that whatever the profits are, and, however they are to be measured, those profits result, not from the original contract, but from the affirmance of the contract by the principal, and that, therefore the profits which are made by the agent are neither clandestine nor surreptitious. I can conceive two possible claims being made. The one would be on the view that the profits were the difference between the purchasing and the selling price

[1] *In re Cape Breton Co.*, L. R., 29 Ch. D., 795.

in the hands of the agent, but as has already been observed by Lord Justice Bowen, that cannot possibly be the measure of the claim of the principal, because at the date when the agent purchased he was not the agent of the principal, and the principal, therefore, had no right to go back to that date and fix it as the time at which he acquired a right to retain the property at the price paid for it by the agent. The other claim would be on the view that the profits were the difference between the real value, or the market value, if a market value exists, and the actual price at which the property was sold by the agent to the principal. I think the principal cannot claim that difference, because it appears to me that in such a case as this, where the principal had no right to claim the property as having been purchased on his behalf at the smaller price, the voluntary ratification of the purchase by the principal is equivalent for this purpose to a new sale by the agent to the principal after the relation between them had ceased, and that it is only in consequence of that ratification or adoption that any profits remain in the hands of the agent." This case has been approved in *Ladywell Mining Co.* v. *Brookes*[1] where it is said that the ground on which the decision in *in re Cape Breton Co.* depended was that rescission being impossible the Company could not obtain from the directors the profit made in the transaction.

Liability for acts of the sub-agent.—Not only is the agent liable to his principal for his own neglect, want of skill and misconduct, but he is also responsible for the acts of his sub-agent.[2] Thus where the plaintiffs were general agents at Shanghai and employed local agents at various places in China, their local agent at Kinkiang being the defendant, and it was part of the business of the plaintiffs to make advances through the Company's local agents to Chinese merchants upon goods intended for shipment by their Companies steamers, the defendant employed a sub-agent to make such advances with power to draw on the plaintiffs, and the sub-agent fraudulently drew on the plaintiffs for an amount not advanced, which draft was duly honoured by the plaintiffs. Sir R. P. Collier, held that their sub-agent was acting within his authority in making out accounts and inserting therein advances made on account of the plaintiffs, and in drawing bills for the purpose of covering advances made, and although it could not be assumed that he was authorized to commit a fraud, it was yet within his authority to have made such an advance as was charged for, and that the case therefore fell within the authority of *Barwick* v. *English Joint Stock Bank*[3] in which Mr. Justice Willes had observed "In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the

[1] L. R., 35 Ch. D., 400 (408) (414).
[2] Ind. Contr. Act, s. 192.
[3] L. R., 2 Ex., 259.

manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in;" the defendant was therefore held liable for the acts of the sub-agent.[1]

Agent not liable for refusal to make bets on behalf of principal.—An agent is, under no legal liablity to his principal for breach of contract to make bets, which if made, would be not recoverable by law. Thus in *Cohen* v. *Kittell*,[2] the plaintiff employed the defendant to make certain bets on his account, which the defendant neglected to do: the plaintiff sued the defendant to recover damages for the breach of contract of agency. The Court were of opinion that the contract was one which if made would have been null and void, the performance of which could not be enforced by any legal proceedings for the benefit of the plaintiff, and that the breach of such a contract could give no right of action to the principal. The right of the plaintiff to have recovered in respect of the contract said to have been made on his behalf, being an essential ingredient in the case against the agent for negligence in not contracting. Where the agent has, however, made the bet, won it, and been paid, he is bound to pay it over to his principal.[3]

Liability of directors for negligence.—The directors of a Company are equally with other agents liable for negligence. They are responsible for the management of the Company, where by the articles of association, the business is to be conducted by the board with the assistance of an agent; and they cannot divest themselves of their responsibility by delegating the whole management to the agent, and abstaining from all inquiry, for if he proves unfaithful under such circumstances, the liability is theirs, just as much as if they themselves had been unfaithful; and further the estate of a deceased director may also be held liable for such negligence, as the mis-feasance of a dircetor is a breach of trust, and not a mere personal default.[4]

Liability of a commission agent.—The nature of a dealing between a merchant in one county and a commission agent in another, and the liability of one to the other of them is discussed at much length in *Ireland* v. *Livingston*,[5] the relationship between them is that of principal and agent.[6]

Agent's right of set-off.—In connection with the liability of the agent to his principal, some few defences which may be raised by the agent may be

[1] *See also Swire* v. *Francis*, L. R, 3 App. Cas, 106. *Mackay* v. *Commercial Bank of New Brunswick*, L. R, 5 P. C., 412

[2] L R., 22 Q. B. D., 680.

[3] *Beeston* v *Beeston*, L R., 1 Ex. D., 13. *Bridger* v *Savage*, L. R., 15 Q. B. D., 363.

[4] *New Flemming Spinning & Weaving Co.* v *Kessowji Naik*, I. L R., 9 Bom., 373. *Mahomed Noor Khan* v. *Hur Dyal*, 1 Agra H. C, 61

[5] L. R., 5 H. L., 395

[6] *Cassaboglou* v. *Gibbs*, L R., 11 Q. B. D., 797. *Mahomed Ally Ebrahim Purkhan* v. *Schiller Dosogne & Co.*, I. L. R., 13 Bom., 470.

mentioned. The right to set-off appears to be the same as that which is open to all other persons; and is governed therefore by the ordinary rules of law laid down as to the right to plead a set off.[1] But the right given by s. 111, of the Civil Procedure Code, does not take away any right of set off, either legal or equitable, which parties would have independently of that section; the right will be found to exist not only in cases of mutual debts and credits, but also where the cross demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross suit.[2] The right may, however, be waived,[3] or excluded by express contract. But nevertheless the right, it is submitted, cannot be made use of by an agent against his principal, where its result would be a breach of the agent's duty to his principal. In answer to a suit for money had and received, the agent would be at liberty to set off and deduct all just allowances which he has a right to retain out of the very sum demanded.[4]

Defences in suits for account and for goods sold.—And in a suit for an account where he has been employed to sell goods on credit, he cannot be called upon to pay over the money to the principal until he has received the whole from the person to whom he sold the goods, unless the delay in payment is occasioned by his neglect.[5] So also it would be a good defence in an action brought against an agent for goods sold and delivered, to plead that at the time of sale he disclosed the name of the principal, unless indeed the agent is acting under a *del credere* commission.[6] But he will not in an action for money had and received for the use of his principal be allowed to set up the illegality of the contract as a defence.[7]

The right to compel interpleader.—The agent cannot as a general rule compel his principal to interplead with third parties claiming property in his hands adversely to his principal,[8] but where the third person claims title created by the principal's act subsequently to the delivery of the property to the agent, he may compel the parties to interplead.[9]

[1] Act XIV of 1882, s. 111.

[2] *Clark* v. *Ruthnavaloo Chetti*, 2 Mad. H. C., 296. *Kischorchand Champalal* v. *Madhowji Visram*, I. L. R., 4 Bom., 407. *Bhagbat Panda* v. *Bamdeb Panda*, I. L R., 11 Calc., 557. *Pragi Lal* v *Maxwell*, I. L. R., 7 All., 284.

[3] *See Pragi Lal* v. *Maxwell*, I. L. R., 7 All., 284, (286).

[4] *Dale* v. *Sollet*, 4 Burr., 2133.

[5] *Varden* v. *Parker*, 2 Esp., 710.

[6] *Alsop* v. *Silvester*, 1 C. & P., 107.

[7] *Tenant* v. *Elliot*, 1 B. & P., 3. *Farmer* v. *Russell*, 1 B. & P., 296, but see *Booth* v. *Hodgson*, 6 T. R., 405.

[8] *Crawshay* v. *Thornton*, 2 My. & Cr., 1.

[9] *Tanner* v. *European Bank*, L. R., 1 Ex., 261, which is under Statute: See also *Crawford* v. *Fisher*, 1 Hare, 436.

He cannot dispute the title of his principal.—It is a settled rule of law that an agent cannot dispute the title of his principal; thus in *Dixon* v. *Hamond*,[1] where a bankrupt named Davidson was the surviving partner of one Flowerden, and Flowerden being possessed of a ship had assigned it to one Hart to secure an advance of £1,000, and the ship was accordingly registered in Hart's name. But subsequently Hamond, the defendant, advanced to Flowerden the sum of £900 for the purpose of paying off Hart's debt, and his name was then substituted on the register for that of Hart for the purpose of securing the debt. And the defendant who was an insurance broker effected an insurance as agent for Flowerden and Davidson, and charged them with the praemiums. The ship being lost, the underwriters paid the loss to the defendant as the agent of Flowerden and Davidson. An action was brought by the assignees of Davidson to recover back from the defendant a sum of £1,900 being the difference between the sum of £2,800 received, and the sum of £900 which he had advanced on the security of the ship; it was contended by the defendant that he was only accountable to the executors of Flowerden to whom the ship originally belonged. Held, that the right of the plaintiffs to recover depended on the settled rule of law, that an agent shall not be allowed to dispute the title of his principal; and the agent having received the money in that capacity, could not afterwards say that he did not do so. And the agent being the agent for the partnership could not be permitted to say that he received it for the benefit of Flowerden alone. A further example of this rule of law is to be found in *White* v. *Bartlett*.[2]

When jus tertii may be set up.—As it is the agent's duty to pay over all sums received in the business of the agency, so will the agent be liable to his principal if he do not do so, and he will not ordinarily be allowed to set up as the adverse title of a third person to defeat the title of his principal. Thus where the plaintiff, the captain and part owner of a vessel, authorized the defendant a broker to insure the vessel; the insurance was effected and the vessel subsequently lost; and the defendant received the insurance money from the underwriters. Three other persons, also part owners of the vessel, in question wrote to the defendant informing him of their shares in the vessel, and holding the broker accountable if he parted with the money. The defendant paid over £500 to the plaintiff, but refused to pay over the balance of the insurance money. The plaintiff therefore sued to recover the amount withheld. It was contended on behalf of the defendant, that the plaintiff could not bring the action alone in his own name, he being a part owner only, and set up the right of the other part owners to the fund sued for. The Lord Chief

[1] 2 B. & Ald., 310.

[2] 9 Bing, 378; but see the case of *Hardman* v. *Willcock*, 9 Bing., 382, (note).

Baron, as also the remainder of the Court, held that the plaintiff was entitled to recover; His Lordship said:—"It was urged that all the owners might still bring an action against the defendant ..... I think they cannot, for there is no privity between other persons and the defendant. There is nothing out of which the other owners could make a case against him, whatever they might do against Roberts (the plaintiff) ..... The plaintiff alone employed the defendant, and he, as his agent, having received the money from the underwriters, must be held to have received it for his use, and is therefore liable to him for the amount." Wood B., said:—"By way of defence to this action for money had and received, and it is only the defence the defendant makes, he disputes the plaintiff's title. I am of opinion, that he has failed in setting up that defence. By acting under his orders, upon the terms of the contract with him, the defendant has made the contract absolute in law, and is bound to perform it. The relationship of principal and agent was established between them, and the rights and duties of those characters attached on the plaintiff and defendant, and they have become reciprocally subject to mutual advantages and liabilities."[1] So where the plaintiff, the elder brother and creditor of an intestate, being the possessor of the goods of the intestate under a bill of sale, waived his right under the bill, and expressing his readiness to divide the goods with other creditors; and employed an auctioneer to sell the goods. After the sale the widow of the deceased gave the defendant notice, through her attorney, not to pay the plaintiff but to retain the money until all the creditors should come in; no letters of administration were, however, taken out to the estate; the plaintiff applied to the defendant for his account and for payment of the proceeds of the sale; the defendant, however, refused to comply with these requests; the plaintiff therefore sued to recover the proceeds. The Court held that the plaintiff having employed the defendant to sell had a *primâ facie* right to sue which the defendant was not at liberty to dispute by setting up the right of others; and that even if he could set up the *jus tertii* he had proved no case of any title in any third person, not having shewn that letters of administration had been taken out.[2]

The defence of jus tertii cannot be set up when the third person, being aware of the circumstances, has abandoned his claim.—Thus where the defendant a wharfinger had received a quantity of malt on account of one Bradley a corndealer, who was from time to time accommodated with money by the plaintiff upon the terms that Bradley should make a sale to the plaintiff of a sufficient quantity of malt to cover the amount required, with a condition annexed for re-purchase by Bradley at an advanced price. The malt, of which

[1] *Roberts* v. *Ogilby*, 9 Price, 269.

[2] *Crossley* v. *Mills*, 1 C. M. & R., 298.

the money in question was part of the proceeds, had been sold by Bradley to the plaintiff upon the terms above mentioned, and had been regularly transferred by the defendant in his books from Bradley to the plaintiff; and had nothing further occurred, was held by the defendant at the disposal of the plaintiff Bradley, however, became bankrupt; and his assignees brought an action in trover against the plaintiff to recover the malt held by the defendant on his account, on the ground that the sale of the malt to the plaintiff by Bradley was not a *bonâ fide* sale, but merely colourable to be a sort of security for an usorious contract between the plaintiff and Bradley. This action was compromised. The plaintiff then brought his action to recover £528-11-2 as being part of the proceeds of the malt, which, as between him and the defendant, was undoubtedly his, unless Bradley or his assignees could establish a superior title. For the defendant it was contended that he had a right in this action to contest the validity of the sale as between Bradley and the plaintiff, and to show that, by reason of the transaction being usorious as between them the transfer of the malt in the books of the defendant was wholly inoperative, and that he had a right to consider the property as still remaining in Bradley and his assignees upon the bankruptcy, against whom he could enforce his lien, though he could not against the plaintiff. Lord Denman C J., held that the defendant was not entitled to set up that defence, and said that no instance could be adduced in which it was held that the *jus tertii* could be set up when the third person, being aware of the circumstances, had abandoned his claim.[1] The true ground on which a bailee may set up the *jus tertii* is that indicated in *Shelbury* v. *Scotsford*,[2] *viz.*, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount. It is not enough that the bailee has become aware of the title of a third person. For to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another who makes no claim or has abandonned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever. Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief under an interpleader. The doctrine laid down by Pollock C B., in *Thorne* v. *Tilbury*,[3] that a bailee can set up the title of another only "if he defends upon the right and title, and by the authority of that person appears to be now law "[4] Thus where goods belonging to one Robbins were seized by the plaintiff under a distress for rent of a house alleged to have been demised by the plaintiff to Robbins, and were delivered by the plaintiff to the defendant to sell as his auctioneer. When the sale was about to begin, Robbins served a

[1] *Betteley* v. *Read*, 4 Q. B., 511.
[2] Yelv., 22, (3rd ed.)
[3] 3 H. & N., 534, 537.
[4] *Biddle* v. *Bond*, 6 B. & S., 225; 34 L. J. Q. B. 187

notice on the defendant that the distress was void, and requiring him not to sell, or, if he sold, to retain the proceeds for him The defendants sold the goods, but refused to pay over the proceeds to the plaintiff, and defended an action by the plaintiff, relying on the right and authority of Robbins. The distress was void and tortious, as the relation between the plaintiff and Robbins was not that of landlord and tenant; but although the plaintiff was a wrong-doer there was no fraud on his part, and he thought that he had a right to distrain; held that the defendant might set up the *jus tertii* of Robbins as an answer to the action, the position of the bailee being precisely the same, whether his bailor is honestly mistaken as to the rights of the third person, or fraudulently acting in derogation of them.[1] The rule therefore that an agent cannot dispute his principal's title, by setting up *jus tertii*, is not always applicable, for the estoppel ceases when the bailment on which it is founded is determined by a paramount title.[2] It cannot, however, be set up if the person to whom that right belongs does not set it up himself, but this rule applies as between bailor and bailee.[3] But the bailee may in certain cases set up the right, although he cannot do so if he accepts the bailment with full knowledge of an adverse claim as against the bailor.[4] There are circumstances which will give a defendant a right to set up the *jus tertii*, but they do not, however, consist of the mere fact that he has had notice that the property belongs to somebody else, but that somebody else, who has the right to claim it has claimed it; and that is the case of *Biddle* v. *Bond.*

[1] *Biddle* v *Bond*, 6 B & S. 225; 34 L. J. Q. B 187.
[2] *Ibid*
[3] *Kingsman* v *Kingsman*, L. R, 6 Q B. D., 122
[4] *Ex-parte Davis, in re Sadler*, L. R., 19 Ch. D., 86.

PART II. RIGHT OF AGENT AGAINST THIRD PARTIES.

Right of agent against third parties—His right to sue on contracts in which he has contracted personally—When acting for a foreign principal—When acting for an undisclosed principal—When name of principal is disclosed, but he cannot be sued—Not where he has falsely contracted as principal—Where he has a special interest in the contract—This right is given to auctioneers—To factors—To policy brokers—Right to sue where he has paid over money by mistake—But his right to sue is subservient to that of his principal—Exception—Rights in Tort.

Agent's right to sue third parties.—As a general rule an agent cannot personally enforce contracts which have been entered into by him on behalf of his principal. But yet it may be that when contracting with third persons he has failed through want of using proper language to bind his principal, so that the contract will be presumed to be one with him personally.[1] He may have contracted for a foreign principal, or for an undisclosed principal, or for a principal, though disclosed who cannot be sued; Again it may be that he has such an interest in the contract as would enable him to sue upon it in his own name. In all these cases he will have a right to sue third parties on contracts which he has entered into with them.[2] Subject, however, as will be presently seen to the right of the principal to intervene and sue on his own account.

Right to sue where he is personally liable.—He may therefore sue where he has contracted so as to make himself personally liable.[3] Save where he has contracted in the character of an agent, but in reality on his own account.[4] This rule is referred to by Bayley J., in *Sargent* v. *Morris*,[5] as follows:—"Now I take the rule to be thus: if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name, to say, that he is merely an agent, unless you can also show, that he is prohibited from carrying on that action by the person on whose behalf the contract was made."

When acting for a foreign principal.—He has a right to sue on con-

[1] Ind. Contr. Act, ss 230, para. 2, 233.

[2] *Glascott* v. *Gopal Sheik*, 9 W. R., 254. Ind. Contr. Act, s. 230, para. 2.

[3] Ind. Contr. Act, s. 230, para. 2, and s. 233; see the converse cases collected under "liability of agent to third parties," and *Cooke* v. *Wilson*, 26 L. J. C. P., 15; 1 C. B. N. S., 153.

[4] Ind. Contr. Act, s. 236.

[5] 3 B. & Ald., (281).

tracts which he enters into for the purchase and sale of goods on behalf of a principal resident abroad.[1] A late case on this subject is that of *Green* v. *Frampton*,[2] heard before Charles J., in November 1889. There the plaintiffs sued to recover damages for non-delivery, and for the return of £200 paid by them to the defendant. The plaintiffs were merchants carrying on business at Sheffield, and the defendant was a manufacturer and artist in stained glass in London. By an agreement between the plaintiffs and one Wilkes a merchant of Buenos Ayres, the plaintiffs were to purchase for Wilkes the various goods that he might require, and were to get as long credit as they could for themselves, but when payments became due, they were to look to Wilkes for settlement. On the 20th April 1888, Wilkes ordered of the plaintiffs two coloured glass screens for one Don Sausenina. These screens the plaintiffs ordered of the defendant on the terms that the screens were to be of the estimated cost of £400, half of which sum was to be paid before completion of the work, and the balance on delivery; various correspondence passed between the plaintiffs and the defendant, each treating the other as principal. And on June 15th the plaintiffs paid out of their own pockets the sum of £200 according to agreement. On July 31st, Wilkes came to England, and commenced a correspondence with the defendant, which ultimately resulted on September 25th in the defendant handing over the screens to Wilkes on his paying the balance of the purchase money. Meanwhile the defendant had been carrying on a correspondence with the plaintiffs, and on September 10th informed them that the screens would be ready to be packed and for despatch by the end of the week, and the plaintiffs subsequently urged that the work should be pushed on as much as possible, for fear their client would refuse them. On the 17th September the screens were ready, but the plaintiffs were not prepared to pay the balance at once. On November the 15th, the plaintiffs learned that the screens had been delivered to Wilkes, and they thereupon commenced this action to recover the £200 paid by them and for damages for breach of contract. It was suggested for the defence that there was a general right of the principal to step forward and take delivery, and especially in this case, as the plaintiffs had failed to pay the balance of the purchase money when the goods were ready for delivery. The Court held that the plaintiffs had not committed a breach of the agreement in not paying on the 17th September, since it was not contemplated that the date should be an inflexible one, and therefore that the defendant was not entitled to deliver to Wilkes. It was further held that the defendant had

[1] Ind Contr. Act, ss. 230 para. 2, 233 *Thompson* v. *Davenport*, 9 B. & C., 78 *De Gaillon* v. *L'Aigle*, 1 B. & P., 368. *Armstrong* v. *Stokes*, L. R., 7 Q. B., 605. *Elbinger Actiengesellschaft* v. *Claye*, L. R., 8 Q. B., 313 *Hutton* v *Bulloch*, L. R., 8 Q B, 331. *Josephs* v. *Knox*, 3 Camp., 320. *Oom* v. *Bruce*, 12 East, 235.

[2] Law Times, Nov. 23rd, 1889, p. 64.

treated the plaintiffs as principals, and had themselves committed a breach of the agreement, and that the plaintiffs were entitled to recover.

Where the principal is undisclosed.—He may also sue on contracts which he enters into in his own name for, and on behalf of, a principal who is undisclosed.[1] In such case he is presumed to have acted personally, the question determining his right to sue being ascertainable by the construction of the words used in the contract. As to whether the principal may in this country intervene in the case of negotiable instruments on the face of which his name is undisclosed, is somewhat doubtful, as to this point, however, see the remarks made in the Lecture on the "Liability of the Principal to Third Parties."

Where the name of the principal is disclosed, but the principal cannot be sued.—The agent has also a right to sue where he has disclosed his principal, and the principal cannot himself sue.[2] Under this heading fall cases where the agent has named persons with whom no contract can be made by the description given; persons in existence but incapable of contracting, and proposed Companies which have not yet acquired a legal existence.[3]

No right to sue where person has falsely contracted as agent, but has in truth no principal.—Where, however, a person has falsely contracted with third parties as an agent, when he was in reality acting on his own account, he will not be able to require from such third parties performance of the contract.[4] The case of an *authorized* agent contracting for a named or an unnamed principal is provided for by section 230 of the Contract Act; and section 236 appears to provide for the case of a person, who has no authority at all from any principal, falsely contracting as an agent but in reality on his own account. Section 236 of the Contract Act appears to be wide enough to cover cases both where the supposed principal is named and where he is unnamed; the pith of the section being in the fact that the alleged agent is *falsely* contracting as an agent. The rule of law applicable to such contracts in England appears to be that a person falsely contracting as agent and naming a principal cannot sue upon the contract, if it is a contract involving the consideration of personal skill or knowledge of the person named, or if it were wholly executory, or partially

[1] Ind. Contr Act, ss. 230, para 2 (cl. 2); 233 *Sims* v *Bond*, 5 B. & Ad., 293 *per* Denman C. J, *Schmaltz* v. *Avery*, 16 Q. B, 655. *Humphreys* v. *Lucas*, 2 C. & K., 152. See also *Dale* v. *Humphrey*, E. B. & E., 1004.

[2] Ind. Contr. Act, ss. 230, para. (cl. 3) & 233. *Paley on Ag.*, 374. *Eaton* v. *Bell*, 5 B. & Ald., 34. *Doubleday* v *Muskett*, 7 Bing., 110. *Burls* v. *Smith*, 7 Bing., 705. *Kelner* v. *Baxter*, L R., 2 C. P., 174.

[3] *Pollock on Contr.*, p 118.

[4] Ind. Contr. Act, s. 236. *Lokhee Narain Roy Chowdhry* v. *Kallypuddo Bandopadhya*, 23 W. R., 358.

executed; but when the contract is not of such a nature involving the consideration of personal skill or knowledge, but is of such a nature that partial execution would render it obligatory, and part of the subject matter has been executed, and the person named as principal has accepted a benefit under the contract by accepting part performance with knowledge that the person assuming to be acting on his behalf was the real principal, in such case the agent might sue.[1] But the Contract Act in words makes no distinction of this nature, and lays down that a person falsely contracting as agent cannot sue on the contract. Whether the Courts in this country would allow the agent to sue where the person named as principal has received benefits under the contract, part performance being accepted with full knowledge of the assumed character of the agent, has not been decided. The case in which the person falsely contracts as agent, but does *not name* any principal, is clearly within section 236, and he would be unable to sue on the contract. The rule laid down in *Rayner* v. *Grote* applies to the case of a *named principal*, or at all events that particular case was one in which a person was named as principal

Right of agent to sue on contracts under seal.—Where the agent has contracted under seal in his own name, the right to sue is in the agent alone.[2]

Where agent has a special interest in the contract.—Apart from the right to sue given to the agent in the cases I have mentioned, there are certain circumstances under which agents may enforce contracts entered into by them, although their representative character has been declared. If for instance the agent has a special property in the subject matter of the contract, and is not a bare custodian, it appears that he has in such case a right of suit. Thus in *Williams* v. *Millington*,[3] the plaintiff was an auctioneer and was employed by one Crown to sells his goods by auction. The sale was at the house of Crown, and the goods were known to be his property. The defendant bought goods for £7-9-6, and after packing them in a cart and puting into the plaintiff's hands £2-4-6 in cash, drove off and made out a receipt for 5 guineas as for a debt due from Crown to the defendant. On settlement of accounts between the plaintiff and Crown, the latter refused to take the receipt, and the plaintiff thereupon sued the defendant to recover the £5 covered by the receipt. It was contended on the plaintiff's behalf that he had a special property in the goods, and therefore might maintain the action. Lord Loughborough held that an auctioneer had a possession coupled with an interest in goods which

[1] *Rayner* v. *Grote*, 15 M. & W., 359. See *Bickerton* v. *Burrell*, 5 M. & S., 383. Smith's Merc. Law, 158.

[2] *Dancer* v. *Hastings*, 4 Bing. 2. *Shack* v. *Anthony*, 1 M. & S. 572. *Berkeley* v. *Hardy*, 9 B. & C., 355.

[3] 1 H. Bl., 81. See also *Robinson* v. *Rutter*, 24 L. J. Q. B., 250.

he is employed to sell, not a bare custody like a servant or shopman; that there was no difference whether the sale was on the premises of the owner, or in a public room, for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell; that an auctioneer has also a special property in him, with a lien for the charges of the sale, and commission; that though he is like a factor, in some instances the case was stronger with him than with a factor, as the law imposed upon him the payment of a duty, and the credit in case of a delivery without the recompense of a commission *del credere*. Heath, J., said:—"It is the same thing whether the goods be sold on the premises of the owner, or in an auction room; the possession is in the auctioneer, and it is he who makes the contract; if they should be stolen, he might maintain trespass, or an indictment for larceny, he has therefore a special property in them, which is all that is necessary to support this action." Wilson J., although, by no means considering the matter clear, acquiesced in the decision of the Court on the ground that the defendant having contracted with the plaintiff and obtained possession of the goods, was estopped from saying that the plaintiff had no right to contract; In *Coppin* v. *Walker*,[1] Parke J., expressly states that nothing decided in that case breaks in upon the authority of *Williams* v. *Millington*.[2] And the direction of Lord Loughborough in this latter case, is cited and evidently approved; and Field J., adds "It must be remembered that according to *Williams* v. *Millington*,[2] auctioneers have much larger rights than ordinary agents; the actual delivery of the goods is entrusted to them, they have a lien upon the goods for their charges" (in this country, however, save under special agreement, only a special lien) "and their possesion of goods is complete till delivery." But if the auctioneer sells goods and delivers them, without notice of any lien or claim which he has on the owner, and the buyer without such notice settles for the goods with the owner, the auctioneer cannot sue the buyer for the price of the goods;[3] and further it has been held in the Punjab that where an auctioneer put up the property of one Bull to auction in execution of a decree held by one Balchar, and part of the property was purchased by the defendant who took delivery without paying the price, a suit to recover the money lies by the auctioneer, as there might be taken to be a distinct understanding that purchasers should pay the price of the goods purchased by them to the auctioneer.[4] So where an agent who had an interest in one half of a ship, and the owner of the other half being indebted to him, had authorized him to insure the ship in his own name in order that if the ship

[1] 7 Taunt, (241).

[2] 1 H. Bl., 82.

[3] L. R., 2 Q. B. D., 355.

[4] *Daniels* v. *Boulger*, Punj. Rec., (1884), 241.

were lost, he the plaintiff might receive the whole insurance money and pay himself the amount of the debt, it has been held that the agent is able to sue for the insurance money in his own name.[1] So where two persons assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound such debts, under which the plaintiff submitted to arbitration the matter in difference then subsisting between his principals and the defendants, and the plaintiff and defendants promised each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, the Court held that the plaintiff might sue in his own name.[2] There, however, the agents had already an interest. Similarly, it is submitted factors are entitled to sue as principals, whether acting under a *del credere* commission or otherwise, as the goods of their principals are entrusted to their custody, and they have a special property in them and a lien thereon This is undoubted law in England; the Indian Contract Act, however, does not expressly give to a factor by that name, or indeed an auctioneer, any larger powers than any other agent, and it may be that he would be unable to sue in his own name where his principal is named and known. I think however the general custom of merchants or law merchant which effects particular classes of persons, and resembles the Common law in following precedents, gives the factor this right, irrespective of the Contract Act which does not purport to be exhaustive on the subject of principal and agent.[3] As to this point Mr. Story says, "Domestic factors are by the usages of trade treated as principals, (although not as exclusive principals, for the real principal may sue and be sued upon the contract of the factors); and this without any distinction, whether, in making the contract they are known to be acting as factors or not, whether they act under a *del credere* commission or not. In every contract so made by them, they are entitled to sue and be sued as principals"[4] The ground on which this right is put, is on the "Usage of trade." The decision of their Lordships of the Privy Council, in *Mirtunjoy Chuckerbutty* v *Cockrane*,[5] just referred to above, decided during the time the Indian Factors Act was in force, and before the repeal of that Act by the Contract Act, (though the Act is not mentioned in the decision) shows that on the failure of want of evidence to shew that any particular usage or custom qualifying the law of England as between principal and factor prevails in Calcutta, the powers and duties of factors in making consignments of their principal's goods must be determined by the general mercantile law of England. And if in that particular respect

[1] *Provincial Insurance Co. of Canada* v. *Leduc*, L. R., 26 P C., 224.

[2] *Banfill* v. *Leigh*, 8 T R., 571

[3] *See Mirtunjoy Chuckerbutty* v. *Cochrane*, 4 W. R., P. C., 1 (4).

[4] *Story on Ag.*, 400

[5] 4 W. R. P. C., 1.

surely in others also. So that unless this general usage of merchants can be said to be inconsistent with provisions of the Contract Act, it would, it is submitted, enable the factor to sue.

Rule as to policy brokers—Policy brokers may sue in their own names on the policy; this is stated by Erle J, in *Sunderland Marine Insurance Company* v *Kearney*,[1] in which his Lordship referred to a passage in Arnold's Marine Insurance[2] where it is said—"As, generally speaking, policies in this country are effected by brokers in their own names, for the benefit either of a named principal, or of whom it may concern, the general rule is, that the action on the policy so effected may be brought either in the name of the principal for whose benefit it was really made, or of the broker who was immediately concerned in effecting it; it is treated in fact, as the contract of the principal as well as of the agent"

Agent may sue where he has paid over money by mistake—So also it appears that an agent who has paid over money by mistake may sue for it, and the reason is that he is responsible to his principal for the mis-payment, thus in *Stevenson* v. *Mortimer*[3] it was held that where a man pays money by his agent, which ought not to have been paid, either the agent or the principal may bring an action to recover it; the agent may do so from the authority of the principal; and the principal may do so, as proving it to have been paid by his agent. See also the case of *Colonial Bank* v. *Exchange Bank of Yarmouth*[4] and *Oom* v. *Bruce*[5] which latter case was one where an agent insured for a foreign principal, but the decision does not appear to be put upon that ground.

Right of agent subservient to that of principal.—But the right of the agent to sue is subservient to the right of the principal to sue,[6] so that wherever both the principal and agent have a right of suit upon a contract made by the agent, the principal may sue in his own name (where the agent has no interest or superior right to the property), superseding the right of suit by the agent;[7] but he must do so subject to all the equities, in the same way as if the agent were the real principal[8] But although the principal's right is paramount to the agent's, yet it is not so when the latter has a lien over the subject matter of the suit equal to the claim of the principal[9]

[1] 16 Q. B., (934), (989).
[2] Vol. 2, 1249, (c.)
[3] 2 Camp, 805.
[4] L. R, 11 App Cas., 84.
[5] 12 East, 225.
[6] *Sadler* v. *Leigh*, 4 Camp., 195. *Morris* v. *Cleasby*, 1 M. & S, 579 *Coppin* v. *Walker*, 7 Taunt., 237
[7] *Coppin* v *Walker*, 7 Taunt, 237, 1 M & S, 576 *Bickerton* v *Burrell*, 5 M. & S., (385).
[8] Ind Contr. Act, s 231.
[9] Evans on Pr. & Ag., 472; *Hudson* v. *Granger*, 5 B. & Ald, 27.

Right of agent against third parties in tort—The remedy of agents against third persons in tort is, as a general rule, confined to cases where the right of possession is injuriously invaded, or where they incur a personal responsibility or loss or damage in consequence of the tort[1] Thus where an agent has actual possession of property belonging to his principal, he may maintain an action for any tort committed by a third party, whereby such possession is affected[2] So where goods have been bailed, and a third person wrongfully deprives the bailee of the use or possession of them, or does them any injury, the bailee is entitled to bring a suit for such deprivation or injury.[3] But there may nevertheless be cases in which the agent may sue, though he be not in actual possession of the property with reference to which the wrong arises Thus where a manufacturer consigned to his agent, a factor, a quantity of goods for the special purpose of meeting a bill drawn upon him, and transmitted to the agent a receipt showing that the goods had been received on board to be delivered to the agent, the latter was held to have sufficient property in the goods and right to their possession to entitle him to sue a wrongdoer who sought to withhold possession,[4] but this will not be so, where the principal alters the destination of the goods and gives instructions to others.[5]

[1] *Story on Ag*. 416.

[2] *Fowler* v. *Down*, 1 B. & P., 47, see also *Armory* v *Delamire*, 1 Str., 505. *Sutton* v *Buck*, 2 Taunt, 302

[3] Ind Contr. Act, s 180

[4] *Evans* v *Nichol*, 4 Scott N R, 43: see also *Bryans* v. *Nix*, 4 M. & W., 775. *Hallis* v *Smith*, 1 B. & P, 563 *Anderson* v. *Clark*, 2 Bing., 20.

[5] *Bruce* v. *Wait*, 3 M & W., 15

PART III. RIGHT OF PRINCIPAL AGAINST THIRD PARTIES.

Right of principal against third parties—Right to sue on agent's contracts—Where agent authorizes contracts in the name of his principal—Where agent has contracted in such form as to make himself personally liable—But he must take the contract subject to all equities—His right to sue is paramount to agents, save where agent has a lien equal to the claim of the principal—Right to adopt contracts made by agent—Right to sue where agent has paid over money or delivered property on a consideration which fails—Where money has been paid over by agent by mistake—Where unnecessary payments have been made—Right to recover deposit upon contract which is rescinded—Right to rescind where agent has acted fraudulently—Right to follow money wrongfully applied by agent—Right to recover goods wrongfully distrained—Right to recover property wrongfully disposed of by agent—Effect of fraud on agent's pledge

Right to sue on agent's contracts—First, the principal is entitled as against third parties, to all the rights, benefits, and advantages of all contracts entered into on his behalf by his agent [1] For as he is bound by the acts and contracts of his authorized agent, so he may take advantage of the same.[2] And as Mr. Kent says:—Every contract made with an agent in relation to the business of the agency, is a contract with the principal, entered into through the instrumentality of the agent, provided the agent acts in the name of his principal ..... It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent.[3] And being responsible he may sue upon the contract.

Where the agent authorizedly contracts in the name of his principal—In this case there is no difficulty, the contract though made by the agent, is the contract of the principal, and he may therefore sue upon it [4] Illustrations of this rule are hardly necessary; The case, however, of *Bommee Chetty Ramiah Chetty* v. *Visvanada Pillay*,[5] may be referred to as an example of the principal's right when disclosed to sue on notes unendorsed over to him by the agent There, the promissory note sued on was made by the defendants promising to pay to V. C Ramiah, therein described to be "the authorized agent of E. B. Chetty" (the plaintiff), or order Rs. 400 on demand; V. C. Ramiah did not endorse this note over to the plaintiff The plaintiff sued upon the note,

[1] Ind. Contr. Act, s 226

[2] *Seignior* v. *Walmer*, Godbolts, 360.

[3] Kent's Comm, Lect. 31, p 834.

[4] Ind. Contr. Act, s. 230.

[5] 6 Mad. Jur, 305.

and the defendants did not deny their liability. The judge of the Madras Small Cause Court considered that as the plaintiff was no party to the contract, he could not therefore sue upon it, although he was of opinion that the evidence shewed that as between the plaintiff and V. C. Ramiah, the latter was merely the agent of the former in the transaction, and that, as between the two, the plaintiff was alone beneficially interested in the note. The plaintiff was therefore nonsuited, contingent on the opinion of the High Court whether the plaintiff could recover. Holloway J., said, "The question has usually been whether a man who has signed a note or bill, is himself liable. Here it is whether, upon a note executed to A as agent of B, the principal can sue. The question from the earliest case to the latest, has been, what is the construction? ..... In all the later cases both where the personal liability has been maintained and where it has been allowed, evidence has been given of the circumstances of the parties for the purpose of reading the words by the aid of the light thrown upon the transaction by these circumstances. If there were no words susceptible of the construction that the contract was with the plaintiff, extrinsic evidence would be inadmissible to enable him to sue. This arises from the peculiarity of the law governing these instruments. Here, however, it seems to me that the better construction of the bare words is that the note was executed to the principal, and the evidence satisfied the learned Judge that the consideration moved from the plaintiff who is the holder of the note. I am clearly of opinion that on the proper construction of the note, the plaintiff should have been allowed to recover." Kernan J., said:—"There can be no question that the Judge below was entitled to enquire into the circumstances under which the note was made. In a much stronger case, where a defendant was sued on a note, and contended that upon the construction of it, he should be held to have signed only as agent, he was allowed to show the surround ng circumstances to enable the Court to come to a right conclusion, *Abd* v. *Sine*, following *Lindus* v. *Melrose*.[1] Parol evidence is no doubt not admissible to discharge from liability an agent who became a party to a contract as principal; but such evidence is admissible to show that one or both of the contracting parties were agents for other persons (and acted as agents in making the contract) so as to give the benefit of the contract on the one hand to, or to charge with liability on the other, the unnamed principals, when such evidence should not be encumbered with the terms of the instrument, (*Higgins* v. *Lewis*.[2]). The exception in the case of bills and notes is this, that in neither case can any but the parties named in the instrument by their name or firm be made liable to an action upon it (*Beckham* v. *Drake*.[3]) To the same effect is Lord Abinger's judgment at page 92.

[1] 2 H. & N., 293, 3 H. & N., 177
[2] 3 M. & W., 834
[3] 9 M. & W., 96, *per* Parke B.

I am not aware of any rule of the Law Merchant regarding bills or notes which should interfere in this case to intercept the ordinary general rule of law that a principal may sue upon the contract made on his behalf by his agent. Then the case states that the circumstances under which the note was made were, that it was so made in respect of a transaction between the plaintiff Ramiah, his agent, and the defendant, and that the consideration for the note moved from the plaintiff The amount is due to the plaintiff and he is the holder of the note. We are therefore of opinion that the construction, by the learned Judge, of the note was not correct, and we decide that the plaintiff was entitled to sue upon it."

Where the agent has contracted in such form as to make himself personally liable.—The principal again has a right to enforce all contracts entered into by the agent with third parties in which the agent has made himself personally liable.[1] And where the agent contracts with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may also require the performance of the contract, but if he does so, he does so subject to the right of the other contracting party to set up and make use of the same rights and defences as he would have had as against the agent if the agent had been principal;[2] that is to say, he must take the contract subject to all equities.[3] And one of such rights open to such other contracting party as is last mentioned is, that he may, if the principal discloses himself *before* the contract is completed, refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract,[4] always provided, however, that such contracting party has not induced the principal to act upon the belief that the agent only will be held liable.[5] And although the agent may also be entitled to sue on the contract as well as the principal,[6] yet the principal's right to sue is paramount to that of the agent,[7] save where the latter has a lien over the subject matter of the suit equal to the claim of the principal.[8] For the mere fact that an agent is employed can never affect the right of the principal to receive money justly due to him.[9] As to whether on notice an undis-

[1] Ind. Contr. Act, ss. 230, para 2, 233.

[2] Ind. Contr Act, s. 231. *Dresser* v *Norwood*, 34 L. J. C. P., 48. *Westwood* v. *Bell*, 4 Camp , 349 *George* v *Claggett*, 7 T. R , 359.

[3] *Premji Trikamdas* v *Madhowji Munji*, I. L R , 4 Bom., 447.

[4] Ind Contr Act, s 231, para 2 *Humble* v *Hunter*, 17 L J. Q. B., 350.

[5] *Premji Trikamdas* v *Madhowji Munji*, I L. R., 4 Bom. 447. Ind. Contr. Act, s. 234, *Heald* v. *Kenworthy*, 10 Ex., 739. [ciprocal.

[6] Ind. Contr. Act, 233, conversely ; the right to sue and the liability to be sued being re-

[7] *Morris* v. *Cleasby*, 1 M & S., 576

[8] *Evans on Prin. & Ag* , 472 *Hudson* v. *Granger*, 5 B. & Ald , 27.

[9] *Tayler* v. *Ashmedh Koonwar*, 4 W. R., 86.

closed principal may step in and affirm or revoke the agent's contract, the late case of *Glubb* v. *Campbell*,[1] is an authority. There, Miss Glubb had a nephew, a clerk on the Stock Exchange, and she was induced to entrust him with a sum of money amounting to £2,700, of which £800 was given to advance him in his business, and the remainder was to be invested on good security to pay 10 per cent., of which the plaintiff was to receive 8 per cent., and the nephew 2 per cent. The nephew entered into negotiations with the defendant Campbell, and finally the money was lent to him at 10 per cent., he also entering into a bond for repayment: there was also some negotiations as to Campbell giving security, but none was in fact given. In January 1888, the plaintiff discovered that the money had not been invested in accordance with her instructions, and a solicitor was therefore instructed to enquire into the matter. Campbell had meanwhile paid back certain sums to the nephew, and on the nephew's representation paid further sums, although having received notice of the plaintiff's claim to the money. On the 9th January, Campbell promised to make no more payments Meanwhile in August the plaintiff's nephew had commenced an action against Campbell for the recovery of the whole sum lent by him, and an order was made that the matter be referred to a referee. On these facts Cave J., held that there was no evidence of fraud on the part of Campbell to go to the jury. The pleadings were amended and the action was framed as for money had and received On behalf of the plaintiff, who had intervened, it was urged that as an undisclosed principal, she could, on notice given, step in and either affirm or revoke the contract, and that after such notice all payments made to the nephew were void as against the plaintiff—held that notice having been given, Campbell ought not to have made further payments except to the plaintiff, and that the plaintiff should recover the whole sum lent less the amount paid back to the nephew before notice.

Principal's right to adopt unauthorized contract made by agent with third party.—And again if an agent, having a principal, contract without, or in excess of, his authority the principal may ratify the contract and sue upon it;[2] although in the case of a fictitious agent having *no principal*, the agent would not be able himself to sue.[3] The principal will not, however, be able to ratify any unauthorized act unless he ratifies the whole of the transaction of which such act formed a part.[4] But such ratification will have no effect, if it subjects a third party to damages or terminates any right or interest of such third party.[5]

[1] L. T. 14th Dec, 1889, p. 119.

[2] *Routh* v. *Thompson*, 13 East, 274. Ind. Contr. Act, s. 196.

[3] Ind Contr Act, s 236.

[4] Ind. Contr. Act, s. 199 *Smith* v. *Hodson*, 4 T. R., 211. *Ishen Chunder Singh* v. *Shama Churn*, W R., (1864) 3.

[5] Ind. Contr. Act, s. 200. *Rayner* v. *Mitchell*, L. R., 2 C. P. D., 357, L. R., 2 Q. B., 143.

Principal's right to sue where agent has paid over money by mistake or delivered property on a consideration which has failed—Where the agent has paid away or delivered over property or money belonging to his principal on a consideration which fails, or otherwise under circumstances which would entitle him to recover it, the principal may sue in his own name to be reimbursed [1] Thus where Suratram Rybhun, the plaintiffs' agents in Calcutta, accepted hundis for Rs. 12,000, drawn upon them by a branch house of the plaintiffs' firm, and the plaintiffs at different times sent to Suratram Rybhun hundis amounting to Rs. 11,400 with instructions to realize them, and to apply the proceeds towards payment of the Rs. 12,000. And Suratram Rybhun had paid Rs 7,000 of this amount, and had realized Rs. 6,400 out of the Rs. 11,400 when they stopped payment. At that time two unmatured hundis for Rs. 2,500 each remained in their hands, and these they endorsed over to the defendant after maturity in trust for their creditors. In an action by the plaintiffs to recover the two hundis. Macpherson J., held that the hundis were sent to the agents for the special purpose of enabling them to take up the hundis for Rs. 12,000, and that they still remained the property of the plaintiffs, subject to the agent's lien for Rs 600; that the mere acceptance by Suratram Rybhun of the hundis formed no consideration, as what they had to do was to accept and pay, and the evidence shewed that they did not pay these hundis, and advanced nothing on them [2] So also where a factor bartered the goods of his principal, the principal may sue the person in whose hands the goods are, to recover the same;[3] So in *Treuttel* v. *Barandon*,[4] two bills were deposited with the defendants by an agent of the plaintiffs', but without the latter's authority, as security for cash advanced by the defendants to the plaintiffs' agent; the agent who had become bankrupt stating that he had received the bills for the plaintiffs, endorsed them to the defendants to whom he gave them as a security on his own account; at the time he so made over the bills, he was indebted to the defendants beyond the amount of these bills, and that the defendants continued afterwards to advance money to him on the bills so deposited. It further appeared that, when the agent received the bills on behalf of the plaintiffs, he wrote a letter to them informing them that he had placed the bills to their credit in account. The plaintiffs sued in trover to recover the value of the two bills. Dallas J., held that the defendants had taken the bills with sufficient notice that the bills did not belong to the agent, and that therefore the plaintiffs were entitled to recover. [4]

Principal's right to sue where unnecessary payments have been made by agent.—So again where exorbitant and unnecessary payments are made by

[1] Smith's Merc. Law, p. 154.

[2] *Hazari Mul Nahatta* v. *Sobagh Mull Duddha*, 9 B. L. R., 1.

[3] *Guerreiro* v. *Peile*, 3 B. & Ald., 616.

[4] 8 Taunt, 100.

an agent, the principal has been held able to recover the sum paid in excess of that which was really due, thus in *Stevenson* v. *Mortimer*,[1] where the plaintiffs were the owners of a boat employed in carrying chalk and lime from Eastbourne to Hastings: and the master of this boat had paid to the defendant a custom house officer as duty upon taking out a cocquet and bond certain monies under an idea that the boat came within the provisions of the Statute 13 & 14 Car 2. c 11 which imposed the duty upon the master; the plaintiff contended that the duty need not have been paid, and, that if it had been necessary, the fees taken were exorbitant and sued the defendant for the recovery thereof Lord Mansfield held that the plaintiff was entitled to recover, saying that "where a man pays money by his agent which ought not to have been paid, either the agent, or principal may bring an action to recover it back. The agent may from the authority of the principal, and the principal may, as proving it to have been paid by his agent."

Right to recover deposit upon contract which is rescinded.—So also he is entitled to sue to recover a deposit made by his agent upon the contract under which it was paid being rescinded. Thus in *Norfork, (Duke of)* v. *Wortly*,[2] an estate the property of the defendant was advertized for sale as consisting of 486 acres of land at *about one mile from* Horsham and four from Crawley, one of the conditions of sale being that if through any mistake the premises should be improperly described or any error or mis-statement be inserted in this particular, such error should not vitiate the sale, but should merely entitle the vendor or the purchaser to a proportionate allowance. The sale was to have taken place on the 21st December; but on the 15th a written agreement was entered into between one Richardson on the behalf of the defendant, and J Harding who then appeared as a principal, whereby the defendant was to convey the premises to Harding on or before the 20th January for £1,575 to be paid to Richardson on the execution of the conveyance; a deposit of 300 guineas being paid by Harding to Richardson at the time of the agreement After the deposit was paid Harding intimated for the first time that he had not purchased the estate for himself, but for the Duke of Norfolk; on the 19th January, Harding informed Richardson that the Duke would not complete the purchase, as the estate, instead of being only one mile from Horsham, was between three and four. The Duke sued to recover the deposit alleging that this constituted such a variance from the particular as to vitiate the contract of sale; it was objected that the action ought to have been brought in the name of Harding, Lord Ellenborough held that although on the agreement Harding only might have been liable, yet the question was whose money was paid as a deposit; and that if it was the money of a principal paid through the medium of an agent, it might be recovered back by the principal upon the contract under which it was paid being rescinded.

[1] 2 Camp., 805. [2] 1 Camp., 337.

Right to rescind contract where agent has acted fraudulently on principal. Where an agent has made an agreement with a contractor which amounts to a fraud on his principal, the latter has a right to rescind the contract and to recover back all monies paid under it, or to have such other relief as the Court may think right to give him [1]

Right to follow money wrongly applied by the agent—Where the principal is justified in repudiating the act of his agent he may follow his property, or whatever it has been converted into, into the hands of third parties, as long as it is possible to identify it Thus where a draft for money was entrusted to a broker to buy exchequer bills for his principal, and the broker received the money and misapplied it by purchasing American Stocks and bullion, intending to abscond with it and go to America, and he did so abscond, but was caught before he quitted England, and thereupon delivered over the Stock and bullion to his principal who sold the gold and received the proceeds the broker, however, became a bankrupt on the day on which he misapplied the monies, and his assignees sought to recover the proceeds above mentioned, the Court, however, held that the principal was entitled to withhold the proceeds from the assignees [2] Lord Ellenborough said "The plaintiffs (the assignees) are not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, *viz*, that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property And secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy And, indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state or form can divest it of such trust, or give the factor or those who represent him in right, any other more valid claim in respect to it than they had before such change" His Lordships therefore decided these points in favour of the defendant So where one Cooke, a trustee, employed a broker, who had notice of the trust, to sell out consols and invest the proceeds in railway stock, and the broker sold for cash, bought railway stock to the same amount for the settling day, and recovered the price of the consols in a cheque, which he paid into his account at his bankers. The broker stopped payment before the settling day and went into liquidation Cooke claimed so much of the broker's balance at his bankers as was attribut-

[1] *Panama and South Pacific Telegraph Co v India Rubber Gutta Percha and Telegraph Works Co*, L R 10 Ch 515

[2] *Taylor* v. *Plumer*, 3 M & S, 562.

able to the price of the consols. The Registrar disallowed the claim. On appeal, held, on the principle of *Taylor* v. *Plumer*,[1] that if the money could be traced, it could be followed, and the case went back to the Registrar for finding on that point.[2] It was, however, at one time held that money which Banking Company had been employed as agents to collect and remit, but which they paid into their own bank, and subsequently went into liquidation, could not be followed and claimed in priority to the claim of other creditors of the bank;[3] but this case has been dissented from in *In re Hallett's Estate, Knatchbull* v. *Hallet*.[4] And there is no difference between the position of a factor or agent and the position of a trustee as regards following money. So far from that being the case all the decided cases proceed on the ground that there is no such distinction, and the only reason for any difficulty, is the difficulty of ascertainment, *i. e.*, tracing the fund.[5] "It has," as says Thesiger L. J., in *Knatchbull* v. *Hallett*,[5] at page 722, "been established for a very long period, in cases of law as well as in cases of equity, that the principles relating to the following of trust property are equally applicable to the case of a trustee ..... and to the case of factors, bailees or other kind of agents. It has been also established, and for a long period, ... that those principles may, under certain circumstances, be applicable to money as well as to specific chattels. The principle of law may be stated ..... in these terms, namely, that wherever a specific chattel is entrusted by one man to another, either for the purposes of safe custody, or for the purpose of being disposed of for the benefit of the person entrusting the chattel, whether the chattel has been rightfully or wrongfully disposed of, it may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material. There is no doubt that there are to be found here and there in the books, *dicta*, principally of Common Law Judges, which would appear to militate against the generality of that proposition, and which would appear to show that in the mind of those Judges there was the view that while chattels might be followed, or money so long as it could be looked upon as a specific chattel, as money numbered and placed in a bag, yet when those monies had been mixed with other monies that there was no ear mark, and neither at Law nor in Equity could they be followed. With reference, however, to those *dicta* it appears to me that there are two observations to be made. In the first place I cannot find any decision which has followed out those *dicta* to their conse-

[1] 3 M. & S., 562.

[2] *Ex-parte Cooke in re Strachan*, L. R., 4 Ch. D., 122.

[3] *Ex-parte Dale & Co.*, L. R., 11 Ch. D., 772.

[4] L. R., 13 Ch. D., 696.

[5] *In re Hallett Estate Knatchbull* v. *Hallett*, L. R., 13 Ch. D., 718, 719, 720, 722.

quences, assuming that those *dicta* are to be treated as having the generality which at first sight attaches to them. And in the second place, it appears to me, that in many cases those *dicta*, looking to the facts of the particular case, may be restrained to those facts, and possibly may have a more limited meaning than that which has been attached to them by Mr. Justice Fry in the case of *ex-parte Dale*.[1] ..... As far as I can judge, the only exception to the general proposition which I have stated is not a real exception, but an apparent exception, for all cases where it has been held that monies mixed and confounded, but still existing in a mass, cannot be followed, may, I think, be resolved into cases where, although there may have been a trust with reference to the disposition of the particular chattel which those monies subsequently represented, there was no trust, no duty in reference to the monies themselves beyond the ordinary duty of a man to pay his debts; in other words that they were cases where the relationship of debtor and creditor had been constituted, instead of the relation either of trustee and *cestui que* trust, or principal and agent." It is true that *ex-parte Dale* takes a different view, but that case has been dissented from in the one last cited.

Right to recover goods wrongfully distrained —The principal also has a right to recover goods which have been wrongfully distrained on at the premises of his agent where they had been sent by the principal on commission sale. Thus in *Findon* v. *M'Laren*,[2] the plaintiff sent a carriage to one John Bayley for sale on commission; and whilst the carriage was standing exposed for sale, the defendant, a bailiff, took it as a distress for rent due from Bayley, on which the plaintiff brought a suit to recover the carriage. The Court held that the case fell within the principle of the cases regarding auctioneers, and that goods in the hands of a commission agent for sale in the way of his business were exempted from distress, and that therefore the plaintiff was entitled to recover.

Right to recover property wrongfully disposed of by agents.—Where a servant has wrongfully disposed of property belonging to his master which has been given into his charge, the master has a right to sue the person into whose hands the goods came to recover the same. Thus in *Biddomoye Dabee* v. *Sittaram*,[3] the plaintiff a lady of property left her house in Calcutta in charge of her jemadar, who, amongst other properties belonging to his mistress, had charge of a box of jewels. The jemadar in the plaintiff's absence broke open the box and pawned the jewels with the defendants. The plaintiff sued the defendants in trover to recover the articles pawned Garth C. J., held that the plaintiff was entitled to recover. Such cases as the above do not fall within the provisions of s. 178 of the Contract Act, which is intended to re-produce part of the Factors Act, and it has been held that that Act applies to mercantile transactions and not

[1] L. R., 11 Ch. D, 772. [2] 6 Q. B., 891. [3] I. L. R., 4 Calc., 497.

to cases of advances on furniture used in a private house not in the way of trade.[1]

Exception to right of principal to recover property disposed of by agent—Where the agent has not obtained the goods of his principal by means of an offence or fraud, he will be at liberty to pledge them to third persons, and if such third person acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the agent in pledging is acting improperly, the principal will not be able to recover them without redeeming the pledge;[2] and not only may he do so where he has possession of the goods, but he may also, with similar restrictions, pledge the goods where he has possession of the bill of lading, dock-warrant, wharehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to the goods,[3] and similarly in all such cases if he complies with the restrictions I have mentioned, the principal will be nuable to recover save subject to redeeming the pledge This section (178) of the Contract Act is intended to replace portions of Act XX of 1844 the Factors Act, which has been repealed; the wording of the section does away with the numerous cases on the words "agent intrusted with possession," and appears to allow the power of pledging to all persons *bonâ fide* in unqualified possession of goods and their documents of title. Nor does it appear that it is now necessary that the advance should be "a present advance," but it may, it seems, be one for an antecedent debt; nor is it necessary that the agent in possession of the goods or documents of title should have any existing authority to pledge them, the fact that he is so in possession being alone sufficient, if he acts otherwise within the section, to enable him to do so. As to whether general liens are excluded, from the protection given by this section, see the remarks of Lindley J., in *Kaltenbach* v *Lewis*,[4] where the question was decided in the affirmative on the 1st section of 5 and 6 Vic. c. 39, which was at one time extended to India by Act XX of 1844. The test whether the pledgee acts in good faith, was, under the old Act, the answer to the question whether the circumstances of the transaction were such that a reasonable man, and a man of business applying his understanding to them would certainly know that the agent had not authority to make the pledge,[5] that test will equally apply to s 178 of the Contract Act. The case just referred to,[5] was an action of trover to recover the value of certain bales of twist; the goods in question were shipped in London consigned to Messrs. Gouger Jenkins and Company of Calcutta, the

[1] *Wood* v. *Rowcliffe*, 6 Hare, 191.

[2] Ind. Contr. Act, s. 178.

[3] Ind. Contr. Act, s. 178.

[4] L. R., 24 Ch. D., 54, (79).

[5] *Gobind Chunder Sein* v. *Ryan*, 9 Moo I. A., 140, (153)

business of that firm being then carried on in Calcutta by one Cockshott under a power of attorney. The firm had been in the habit of employing a banian, and to this man Cockshott gave the bill of lading of the twist, endorsing it in blank in order that the banian might obtain a delivery order and the delivery of the goods to the firm. It was also the duty of the banian to find purchasers for the firm's goods, and to receive the price after the purchaser had been approved by the firm. The banian contracted to sell the twist, with Cockshott's assent, to one Doorgapersand; and received from Cockshott the bill of lading for the purpose of delivering the goods under this contract, one of the terms of which was that the goods were to be cleared away and settled for within forty-one days. Without the knowledge or authority of Cockshott the banian sought to borrow from one Gobind Chunder Sein a money-lender Rs 20,000 on a pledge of the bill of lading. The money-lender after making enquiry from Cockshott as to the power of attorney be held from the firm, but making no enquiry from the banian as to his authority to pledge, advanced Rs. 20,000 or thereabouts less a discount of Rs. 400, and took from the banian his note of hand and a memorandum of deposit of the bill of lading in consideration of the advance so made; and the banian on his side authorizing Gobind to sell the goods for his own benefit if repayment was not made in six weeks. At this time the banian was largely indebted to the firm of Gouger Jenkins and Company and having been pressed by Cockshott to reduce the amount of his debt, he had recourse to the above expedient to raise the money, and out of the money so advanced paid Rs. 10,000 to the account of the firm with the Oriental Bank. Gobind Chunder Sein on expiry of the six weeks, applied for delivery of the goods, this was refused on the firm of Gouger Jenkins and Company indemnifying the captain of the ship on board whose ship the goods lay. Gobind then sued in trover to recover the goods. The action was tried by Sir James Colville and Sir Charles M. R. Jackson, who gave judgment in favour of the defendant; a rule *nisi* for a new trial on the ground of misdirection (on a point next to be mentioned) having been obtained, and the rule having been heard, and the plaintiff having rested his title under the Factors Act of 1844 and the defendant insisting that there was evidence for which the Court might conclude that the alleged contract with Doogapershad was a mere fraudulent contrivance on the part of the banian in order that he might obtain possession of the goods, and that therefore upon the authority of *Kingsford* v. *Merry*,[1] and *Higgins* v. *Burton*,[2] the pledge by the banians could give no title even to a *bonâ fide* pledgee. The Court decided that it had been rightly decided by the lower Court that the circumstance of the whole transaction were such as that the plaintiff as a reasonable man and a man of business applying his understanding to them

[1] 26 L. J. Ex, 83.

[2] 26 L. J. Ex., 342.

would certainly know that the banian had no authority to make the pledge, if not also that he was acting *malâ fide* in respect thereof against his principals, and that there was no ground for disturbing the verdict in favour of the defendant The plaintiff then appealed to the Privy Council Their Lordships held that there had been no misdirection, and on the authority of *Navulshaw* v. *Brownrigg*,[1] approved of the manner in which the case had been left to the jury, and on the question whether the plaintiff had notice that the banian had no authority to make the pledge, or that he was acting *malâ fide* towards his principals? held, that the banian had no express authority to pledge, and that even if he had implied authority, there was nothing to show that the plaintiff was aware of such an authority or acted upon the credit of it · and further that it was clear that the banian had acted *malâ fide* towards his principals, and he being largely indebted to them at the time of the transaction, had sought to make a payment to them fraudulently by raising money on their own goods; and from the circumstances of the case, their Lordships came to the conclusion that the plaintiff must have been perfectly certain that the banian was acting without authority, and although, it was unnecessary to say whether with *mala fides*, their Lordships added that they did not themselves entertain any doubt that it was so.

Effect of fraud in pledging—But the principal will have a right to recover his goods pledged by the agent whenever possession of them has been obtained by fraud. Thus where one Verkade a foreign merchant employed one Moffat to transmit offers and to act in the ordinary business as a commission agent, and Moffat effected a sale to one Lambe of 40 tons of oil to be delivered in May and June, but before the oil came deliverable, without any authority from Verkade, and without his knowledge, agreed with Lambe to cancel the contract. Verkade shipped a parcel of this oil in pursuance of the contract, the bill of lading of this shipment being drawn in favour of Verkade or order, and it was by him specially endorsed in favour of Lambe or order and sent to Moffat together with a bill of exchange drawn upon Lambe Moffat instead of procuring Lambe's acceptance of the bill, and handing over the bill of lading, took the bill of lading to Lambe and told him that the endorsement on it was a mistake, and requested him to endorse the bill of lading in order that the goods might be entered at the Custom House; Lambe, believing this, endorsed over the bill generally, thereupon Moffat handed it with instructions for landing and wharehousing to certain wharehousemen, and on the same day obtained from the plaintiffs an advance of £350 on the security of the oil and gave them an order for the same. Verkade subsequently claimed the oil, and the wharfingers refused

[1] 2 De G M & G., 452, referred to as a very valuable authority in *Kaltenbach* v. *Lewis*, L. R, 24 Ch. D., (78).

therefore to deliver it to the plaintiffs, and sued to have it declared that he was entitled to a charge on the oil; The question before the Court was, whether the pledge by Moffat to the plaintiff was valid against Verkade by virtue of the Factors Act. Vice-Chancellor Giffard held that if Moffat had become apparently entitled without the act of any third person, it might be that he would have been able to bind his principal Verkade, but that Moffat was merely employed to negotiate a contract, and the bill of lading was specially endorsed by Verkade to Lambe; that Verkade had nothing to do with the endorsing of the bill of lading by Lambe at Moffat's request, and as it was no act of his which put the oil in the power of Moffat the pledge was not protected by the Factors Act.[1]

[1] *Vaughan* v *Moffat*, 38 L. J. Ch, 144.

LECTURE XI

LIABILITY OF AGENT TO THIRD PARTIES.

General rule is that he is only liable for mis-feasance—But where he contracts in his own name he is personally liable—Examples—Question whether he is personally liable is one of intention and construction—Effect of cesser clause on agent's liability under charter-party—When no oral evidence admissible to discharge agent from liability in case of written contracts—Rule, no evidence to discharge agent, but there may be to charge principal—Ground for this rule—Presumptions of agent's liability—Where agent acts for a foreign principal—Where the principal is not disclosed—These presumptions are rebuttable—What is sufficient disclosure to prevent liability—Effect of not enquiring for whom agent is acting, when it is known that he does business for himself and for a principal—Custom not to disclose may free agent from liability—Grounds on which the English cases on undisclosed principal are decided—The agent is presumably liable where the principal is disclosed but cannot be sued—Liability of public agents in contract—Liability of Commission agents—Liability in cases of warrant of authority—Measure of damages in such cases—Liability of agent acting under innocent mistake—For misrepresentation from a mutual mistake of law—Misrepresentation should be one of fact and not of law—Non-liability where third person induces belief that he will not be liable—Liability to refund monies paid by mistake to his principal after notice—Plea of payment over—Liability for money paid for use of principal but not paid over—Where agent is a stakeholder—To refund money paid to him by coercion—Liability to third persons for refusal to pay over monies as directed by principal—Liability in tort—For misfeasance—When both agent and third person are guilty of fraud—Liability of masters of vessels in tort—Liability for false and fraudulent statements made with actual fraud—Liability for deceit—Director not liable for fraud of co-director—Liability for conversion—Liability of innocent agent for conversion—Effect of appropriation where there is a dispute—Ordinary and special damages—Joint tort feasors in trespass—Liability of public agent for wrongful act—Liability of judicial officers.

General rule.—As a general rule an agent is only liable to third persons for mis-feasance; and the reason of this rule is clear when it is considered that he owes performance of his duties as agent only to his principal, and therefore no suit will lie against him by third persons for non-performance of such duties. But nevertheless, although this is so, he is, as every other person would be, liable to third persons where he negligently or wilfully causes injury to others. And further he may, as will be next pointed out, render himself liable to third persons by reason of the manner in which he has contracted with them. But as a general rule he will not be liable on contracts entered into by him on behalf of his principal, in the absence of a contract to that effect.[1]

[1] Ind. Contr. Act, s. 230, para. 1. See *Kulee Mohun Sircar* v. *Humaun Kader Mahomed Ali Mirza*, 25 W. R., 91.

Where the agent contracts in his own name.—Where an agent signs a contract in his own name without qualification, he is, *primâ facie* deemed to be contracting personally, and is therefore personally liable. Thus where an auctioneer after a sale signed in his own name an agreement which ran as follows:—"I do hereby acknowledge to have sold this day ..... and I the undersigned ..... do acknowledge this day to have purchased," he was held to have rendered himself personally responsible on the contract.[1] So where a person describing himself as agent and consignee of a certain vessel entered into an agreement in his own name stating therein, amongst other matters, "that the said parties thereto agreed" ..... he was held to be personally liable, the "said parties" being held to be the persons actually contracting.[2] So in *Lefevre* v. *Lloyd*[3] where the plaintiff applied to Maitland and Company to sell some cotton for him, who replied that they could obtain 20*d.* per ℔ for it, if it corresponded with sample. The plaintiff wrote that his friends accepted the offer, and Maitland and Company replied that the party would take the cotton at 20*d.* per ℔, to be paid for in a bill at 2 months from its arrival. The plaintiff accepted these terms; Maitland and Company had employed one Lloyd (who at the time of action had died and was represented by his administrator) as a broker to sell the cotton. He having on the arrival of the goods ascertained the price drew a bill on the purchaser for the amount and delivered it to Maitland and Company, who remitted it to the plaintiff. The bill was dishonoured, and the plaintiff therefore sued Lloyd's administrator on the bill. The defence was that the defendant having drawn the bill only as agent for the plaintiff, and without any consideration for so doing, the plaintiff not being himself present to do, was not liable. The Court held that he was personally liable. So when Littledale and Company a firm of brokers sold hemp by auction at their rooms, and gave an invoice describing the goods as "bought of Littledale and Company," and received part of the price, but failed to deliver the goods; on an action being brought against them by the purchaser they were held personally liable as sellers.[4] So again where the defendant an estate agent, contracted to sell land to the plaintiff who paid the deposit, the defendant signing a receipt in his own name for such deposit, and the plaintiff also signed an agreement containing the terms of the purchase. On the owner of the land refusing to complete the purchase, the plaintiff sued the defendant for damages for breach of contract to sell, it was held that the defendant was personally liable.[5] In *Cooke* v. *Wilson*,[6] the contract ran "It is mutually agreed between J. and R. Wilson owners of the ship Jessica now in London of the first part, and L. S. J. Cooke (the plaintiff) on behalf of the

[1] *Gray* v. *Gutheridge*, 1 M. & R., 618
[2] *Kennedy* v *Gonvea*, 3 D. & R., 503.
[3] 5 Taunt, 749.
[4] *Jones* v. *Littledale*, 6 A. & E, 486.
[5] *Long* v. *Millar*, L. R., 4 C. P. D., 450.
[6] 1 C. B. N. S., 153.

Geelong and Melbourne Railway Company of the other part, that the ship should be ready to take on board certain specified goods ..... "*the rates of freight determined upon by the said parties to this agreement ..... one-third to be paid in London on receipt of bills of lading*, and the remainder by the Geelong and Melbourne Railway Company at Geelong"; this contract was signed

J. and R. Wilson,
S. J. Cooke,

the goods were damaged when being taken on board, and Cooke sued Wilson for damages; Cresswell J, held that Cooke was personally bound by the contract and could therefore sue. Conversely he would have thereupon been liable. So again in *Higgins* v. *Senior*,[1] the contract was "Mr S Mead. We have this day sold through you to Messrs. V. Higgins and Son 1,000 tons of varteg ..... iron.

(Sd.) "John Senior and Company,"
"William Senior,"

it was held that the contract purported to be made, on the face of it, by the defendant Senior and that he was personally liable thereon. So again in *Salig Ram* v. *Juggun Nath*,[2] where the defendant's agent unconditionally accepted a bill in his own name, he was held liable So again in *Norton* v. *Herron*,[3] where a person described himself in the beginning of an agreement to grant a lease as making it on behalf of another, but in the subsequent part of it stated that he agreed to execute the lease, he was held personally liable. And where a person covenanted for himself and his heirs and under his own hand and seal for the act of another, he was held personally bound by the covenant although he described himself in the deed as covenanting for and on the part and on behalf of such other person.[4] So in *Burrell* v. *Jones*,[5] where the plaintiff let an estate to one Jones and, the rent being in arrears, caused a distress to be made for rent, and whilst the bailiff was in possession, the defendants who were the solicitors of the assignees of the tenant against whom a commission in bankruptcy had issued, applied to the plaintiff's solicitor Mr. Houston to deliver up the distress, and sent him the following signed undertaking "We as solicitors of the assignees of the said L. J. Jones ..... do hereby undertake to pay Hon. P. R. D. Burrell such rent as shall appear due to him from the said L J. Jones, provided it do not exceed the value of the effects distrained;" held that the expression "we as solicitors undertake," bound those who personally signed it.

The question of the agent's liability is one of intention as discoverable from the contract One test of the agent's liability, is, to see who is by the provisions of the contract the person who is to carry it out; but in each case the question is, however, whether the intention of the agent to bind him-

[1] 8 M. & W., 844.
[2] 1 Agra H. C., 137.
[3] 1 C. & P., 648, Ry. & M 229
[4] *Appleton* v. *Binlls*, 5 East, 147.
[5] 3 B. & Ald., 47.

self personally appears.[1] Thus in *Tanner* v. *Christian*,[2] a written agreement was expressed to be made between Christian on behalf of one Norris, and Tanner, the effect of this agreement was—that Christian on the part of Norris agreed to let to Tanner a house for a term of years, Tanner paying rent to "Christian for the use of Norris." No auction to be held on the premises without the consent in writing of Christian on the part of Norris; Tanner to take a lease and execute a counterpart, "when called upon to do so by Christian on the part of Norris"—Christian signed in his own name. Norris did not sign. In an action by Tanner against Christian for not completing the lease, *held*, that it sufficiently appeared to be the intention of the parties that Christian should himself contract; and that, therefore, he was personally liable. "There is no doubt," said Wightman J., "That a person acting for and on behalf of another, may contract in such terms as to bind himself personally In each case the question is whether the intention that he should do so appears. One test is, to see who is by the provisions of the contract to act in the performance of it. Now here Christian, though for and on behalf of Norris, for whom perhaps he was merely agent, has made a contract by which he himself is to do all that is to be done. Taking the whole language of the agreement together, it is not Norris, but Christian on behalf of Norris, who agrees to let. The rent is made payable to Christian, he is to give the licence to authorize the holding of auctions..... On the face of it, it appears Christian is to act, and that being so, it is precisely the same as *Norton* v. *Herron*[3] in which the defendant on behalf of another agreed that *he*, the defendant, should grant a lease, and was held personally liable on that ground." So also in *Williamson* v. *Barton*,[4] where the defendant attended an auction and bid for certain goods which were knocked down to him, whereupon the auctioneers immediately asked him for his name in the usual way; he gave it, and the auctioneer wrote it down as the name of the buyer. The goods were afterwards delivered. On the defendant being sued for the price he alleged that he bought only as agent for one Smith and had not made himself liable. It was proved that the defendant was the foreman of Smith, who was a contractor for some public works in the neighbourhood, that in truth, the goods were bought for Smith, and that his carts were used to carry away the goods, and that the goods (hay and corn) were consumed by Smith's horses; and further that the plaintiff knew the defendant to be Smith's foreman, but knew nothing as to his agency on that occasion; but that the auctioneer knew nothing of Smith and knew nothing of the defendant or his position Wilde B.,

[1] *Soopromonian Setty* v. *Heilgers*, I. L. R., 5 Calc., 71. *Mackinnon, Mackenzie and Co.* v. *Lang Mow*, I. L. R, 5 Bom., 581. *Thompson* v. *Davenport*, 2 Sm. L. C., 420, (9th ed)

[2] 4 El. & Bl., 591.

[3] Ry & M., 229, 1 C & P, 648.

[4] 7 H. & N, 899.

on these facts, said: "It is well settled that an agent is responsible, though known by the other party to be an agent, if, by the terms of the contract, he makes himself the contracting party see *Higgins* v. *Senior*.[1] And the late cases arising on charterparties have illustrated this principle forcibly, *Leonard* v. *Robinson*,[2] *Parker* v. *Winlow*."[3] His Lordship (with whom Channel B., agreed) eventually held that a person who bids at an auction and gives his name simply to the auctioneer, must be understood to be the contracting party, and ought to be held liable as such; but that even if the evidence warranted the jury in finding that the plaintiff actually know that the defendant was purchasing as agent, the question would remain whether the defendant by his conduct made himself personally liable. That his conduct was that of a man buying for himself, and not for another person; Pollock C. B. and Bramwell B., however, were of opinion that there was evidence to show that the defendant purchased as agent only. So again where a charterparty was entered into between A. of the ship "Celerity" and B. agent of C., which was signed by A, in his own name, the Court held that A., was personally liable, stating that "the only ground for rebutting his personal liability was, that he says he is agent for another, but he may well contract and pledge his personal liability, though he is agent for another."[4] And in *Paice* v. *Walker*,[5] the contract was "Bought of Messrs. Walker and Strange, London, about 200 quarters wheat (as agents for John Schmidt and Company, of Danzig)" and was signed by the defendant's firm Walker and Strange without qualification, the Court, held the defendants personally liable; but this decision has been questioned in *Gadd* v. *Houghton*,[6] and cannot therefore be considered as binding. In the case last mentioned the contract ran "Mr. George Gadd, we have this day sold to you on account of James Morand and Company, Valencia, 2,000 cases, Valencia oranges .....

Sd. J. C. Houghton and Company."

the Court held that the words "on account of" were clear to show that the defendants did not intend to be personally liable The rule as laid down in Smith's Leading Cases,[7] in *Thompson* v. *Davenport*, to determine whether agents contract as principals, is as follows:—"The question whether the person actually signing the contract is to be deemed to be contracting personally or as agent only, depends upon the intention of the parties as discoverable from the contract itself, and it may be laid down as a general rule, that where a person signs a contract in his own name without qualification, he is *primâ facie* to be deemed to be a person contracting personally And in order to prevent this liability from attaching, it must be apparent from the other portions of the

[1] 8 M & W, 834.
[2] 3 El & Bl., 125
[3] 7 El & Bl, 942.
[4] *Parker* v. *Winlow*, 7 El & Bl, 942.
[5] L. R 5 Ex., 173
[6] L R., 1 Ex. D., 357.
[7] 2 Sm. L C, 420, (9th ed.)

document that he did not intend to bind himself as principal." For instance, he may if entering into a charterparty in his own name without qualification save himself by a cesser clause.

The agent can expressly save himself from liability —But even if he contracts in his own name he may expressly exempt himself from liability. Thus when entering into a charterparty he may escape liability by the insertion in the charterparty of a *cesser clause;* this clause provides that the liability of the agent is to cease as soon as the cargo is loaded; and where there is such a clause, he will not be liable for anything that may happen after the loading;[1] or he may save himself by so wording the contract as to make it clear on the face of it, that he is only an agent with regard to it.[2]

No oral evidence admissible to discharge agent from liability, in case of written contracts.—Where an agent has entered into a written contract in his own name, no oral evidence will be admissible for the purpose of exonerating him from liability. This appears clear from Section 92 of the Evidence Act (subject to the provisos there set out) which section lays down that where the terms of any contract have been reduced to the form of a document and have been proved, no evidence of any oral agreement or statement shall be admitted as between the parties to such instrument for the purpose of contradicting, varying, adding to, or subtracting from its terms. On this point there is a *dictum* of Mr. Justice Wilson in *Soopramanian Setty* v. *Heilgier*,[3] a case on the question of liability of an agent under s 230 of the Contract Act, to the effect that he considered that if on the face of a written contract an agent appears to be personally liable, he could not escape liability by the evidence of any disclosure of his principal apart from the written contract.

Rule, no evidence admissible to discharge agent, but may be admitted to charge principal.—The rule of law in England on this point is that parol evidence to discharge the agent is not admissible; but although it is not admissible to discharge the agent, yet it is admissible to charge with liability the principal. As to whether evidence to charge the principal in this country would be admissible apart from the contract there is not much authority The reasoning on which this rule of English law is based is given in *Higgins* v. *Senior*,[4] *Jones* v. *Littledale*[5] and *Beckham* v *Drake*.[7] In *Higgins* v. *Senior*, Parke B said .—"The question in this case

[1] *Green* v *Kopke*, 18 C B, 549 *Oglesby* v. *Yglesias*, 1 El & Bl. El, 930.

[2] *Gadd* v. *Houghton*, L R, 1 Ex. D., 357. *Deslandes* v. *Gregory*, 2 El. &. El., 602. *Soopromonian Setty* v. *Heilgers*, 1 L. R, 9 Calc., 71. *Mackinnon, Mackenzie* v. *Lang Moir*, 1. L R, 5 Bom., 584.

[3] I. L R, 5 Calc, 71.

[4] 8 M. & W., 844.

[5] 6 A. & E, 486

[6] 9 M. & W, 79.

is whether in an action on an agreement in writing purporting on the face of it to be made by the defendant, and subscribed by him, for the sale and delivery by him of goods above the value of £10, it is competent for the defendant to discharge himself on the plea of non-assumpsit, by proving that the agreement was really made by him by the authority of, and as agent for, a third person; and that the plaintiff knew those facts at the time when the agreement was made and signed. Upon consideration we think it was not. There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to,[1] and charge with liability on the other,[2] the unnamed principal, and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent in signing the agreement, in pursuance of his authority, is in law the act of the principal. But on the other hand to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done. And this view of the law accords with the decisions, not merely as to bills of exchange[3] signed by a person without stating his agency on the face of the bill, but as to other written contracts, namely, the cases of *Jones* v *Littledale*,[4] and *Magee* v. *Atkinson*.[5] It is true that the case of *Jones* v. *Littledale* might be supported on the ground that the agent really intended to contract as principal; but Lord Denman in delivering the judgment of the Court lays down this as a general proposition, 'that if the agent contracts in such form as to make himself personally responsible, he cannot afterwards whether his principal were or were not known at the time of the contract, relieve himself from responsibility." The evidence was held not to be admissible. In *Jones* v. *Littledale*, the case above referred to, Lord Denman says :—" There is no doubt that evidence is admissible on behalf of one of the contracting parties to show that the other was agent only, though contracting is his own name, and so to fix the real principal, but it is clear that if the agent contracts in such form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract relieve himself from that responsibility "

[1] *Garrett* v *Handley*, 4 B & C, 644 *Bateman* v *Phillips*, 15 East, 272

[2] *Patterson* v *Gandasequi*, 15 East, 62 *Calder* v *Dobell*, L R, 6 C P, 486

[3] *Sowerby* v *Butcher*, 2 C & M, 371 *Lefevre* v *Lloyd*, 5 Taunt, 749

[4] 6 A & E, 486.

[5] 2 M. & W, 440

Ground for this rule.—The ground on which this doctrine as to evidence being admissible to charge with liability a principal not named in the contract rests, is explained by Parke B., in *Beckham* v. *Drake*,[1] to be, that the act of the agent is the act of the principal, and the subscription of the agent is the subscription of the principal. Baron Parke, however, excepts cases of bills of exchange, which cases he treats as an exception standing upon the law-merchant.[2] The only English case in which any learned Judge appears to doubt the distinction between the admissibility of parol evidence to charge with liability an unnamed principal, and its inadmissible to discharge the agent from liability, is that of *Calder* v. *Dobell*,[3] where Mr. Justice Montague-Smith says:—"I have felt some doubt as to the soundness of that distinction. However it has been followed in a great number of cases, and is now well established; and although technical, it appears to consist with the practical business of mankind. Whether strictly logical or not, it is recognized by law." So again in *Trueman* v. *Loder*,[4] evidence was allowed to be given to charge the principal. There the defendant was sued on a broker's note which ran, "Sold for Mr. Edward Higginbotham." It was proved that the defendant, a merchant of St. Petersburg, had established Higginbotham in London to conduct the defendant's business in the name of Higginbotham, which name was painted outside the business premises and used in all contracts. It was agreed that the name of Higginbotham was not in the written contract, and the Court said:—"Among the ingenious arguments pressed by the defendant's Counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who has just ordered goods in a shop. If he is sued for the price and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own. ..... If the defendant chose to appoint an agent to carry on trade for him in the name of Higginbotham, he clearly authorized that person to do all that would be necessary for him to carry it on; among other things, to employ a broker to sell for him; and it does not lie in his mouth to deny that the name of Higginbotham so inserted by the broker in the sold note is the defendant's own name of business." The question has

[1] 9 M & W, 79, (96)

[2] See as to this in this country lecture on "Liability of Principal to Third Parties."

[3] L R, 6 C P, 486, (496).

[4] 11 A & E, 589.

been discussed in the notes to the leading case of *Thompson* v *Davenport*,[1] there it is said:—"It has been said, that if A contract in writing without naming his principal, so that he appears upon the writing to be himself the principal, does not a creditor who seeks to show, that while thus professedly contracting for himself, he really contracted for a principal, endeavour to infringe this rule of evidence, by adding to the written contract a new term at variance with the written terms? This question, it is, however apprehended, must receive different answers upon different occasions, answers varying according to the object with which it is sought to introduce the parol testimony, which it is submitted, never can be heard for the purpose of *discharging the* agent, but may always be so for that of *charging* the principal." That parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he mentioned his principal at the time of entering into it seems to be now well established."[1] The English cases, therefore, show that parol evidence may be given to *charge* the principal but not *discharge* the agent. In the Indian cases Mr. Justice Wilson[2] has thrown out that parol evidence is not admissible apart from the contract to discharge the agent; The case of *Purmanandass Jivandass* v. *Cormack*[3] was not one against an agent, but was a claim made against the Company (the principal) and does not therefore touch this point, although there the Company contended that credit had been given to the agent and evidence was received on that point. In *Bommee Chetty Ramiah* v. *Visvanada Pillay*,[4] Mr. Justice Kernan in the year 1871, laid down that evidence was admissible to charge with liability a principal, although not to discharge the agent; and it appears that their evidence was taken as to the circumstances under which the note on which the case was founded, was given; the suit, however was not one in which it was sought to make either the principal or the agent liable on the note, but was the converse question of the principal's right to sue—whilst in *Sheo Churn Sahoo* v. *Curtis*[5] no such evidence was allowed, but that case was again on a promissory note, and probably was decided in accordance with the law merchant. If section 92 of the Evidence Act is applicable (for it has been held that that section only applies where it is intended that the whole of the terms of the contract have been reduced into writing[6]) the question is whether the seeking to show that a person other than or as well as the agent is also liable on the contract, is in

[1] 2 Sm L. C, 9th ed, p 423, 424 See also Taylor on Evidence, Vol 2, p 982, (8th ed)
[2] *Soopromonian Setty* v *Heilgers*, I L R, 5 Calc, 71
[3] *Purmandass Jivandass* v *Cormack*, I L R, 6 Bom, 326.
[4] 3 W R, 140
[5] 6 Mad Jur, 305
[6] *Jumna Doss* v *Sreenath Roy*, I. L R, 17 Calc, 176, (note)

any way "adding to or varying" the contract, if not it would be admissible; such evidence has been often held not to contradict the terms of the document.

Presumption of agent's liability.—Where the agent authorizedly contracts on behalf of his principal no liability will attach to him,[1] save in the following cases,

1. Where the contract is made by him for the sale or purchase of goods for a merchant resident abroad:

2. Where he does not disclose the name of his principal;

3. Where the principal, though disclosed, cannot be sued.

In these three cases a presumption arises that the agent is contracting personally[2]; this presumption may, however, be rebutted by the terms of the contract itself,[3] or where there is no written contract by inference from the circumstances of each case.[3]

Where agent acts for foreign principal.—First, where the agent makes a sale or purchase for a merchant residing abroad. In this case the presumption is that he is personally liable; that presumption may, however be rebutted by the terms of the contract itself, or by the circumstance of the case as showing what was the true intention of the contracting parties. The grounds on which this clause of section 230 of the Contract Act is based, is, no doubt, the rule of English Law on this subject; that law holds such an agent to be personally liable, partly on the ground that credit is given to the agent, and partly upon the ground of general convenience, and the usage of trade. At first the early cases of *Thompson* v. *Davenport*[4] and *De Gaillon* v. *L'Aigle*,[5] appear to have treated their liability as more than a *primâ facie* one, but in later cases the *dicta* of Lord Tenterden and Eyre C. J. in those cases have been considered to show only a *primâ facie* liability. The later cases of *Armstrong* v. *Stokes*,[6] *Elbinger Actiengesselschäft* v. *Claye*[7] and *Hutton* v. *Bulloch*,[8] all of which were decided subsequently to the date on which the Indian Contract Act received the assent of the Governor-General in Council on the 25th August 1872 are, therefore though instructive on the point of the liability of an agent acting for a foreign principal, of no direct bearing on the intention of the framers of that Act. There are no Indian cases decided on this clause of section 230; there is, however, one case on the question decided *previously* to the Contract

[1] Ind Contr Act, s 230, para 1 *Hurrish Chunder Telapattur* v *O'Brien*, 14 W R, 248.

[2] Ind. Contr. Act, s. 230, para. 2. *Per* Wilson J, in *Soopromonian Setty* v. *Heulgers*, I. L. R, 5 Calc, 71

[3] *Williamson* v *Barton*, 7 H & N., 899; 31 L J. Ex, 174.

[4] 9 B & C, 78

[5] 1 B & P, 368

[6] L R, 7 Q B, 598

[7] L R, 8 Q B., 313

[8] L R, 8 Q B, 331

Act, *viz.*, *McGavin* v. *Wilson*.[1] It was sought to make the section applicable in *Mahomed Ally Ebrahim Pirkhan* v. *Schiller Dosogne and Company*,[2] where it was contended that a certain indent constituted a contract for sale by certain agents in Bombay on behalf of a manufacturer residing in Paris, and that the agent had entered into a contract for a foreign principal and was therefore liable on the contract as the party to whom credit had been given; but the Court held that the indent in question was merely a letter of instruction to the agents to buy for the merchant in Bombay, and that it would be straining language too far to hold that the document amounted to a contract of sale on account of a foreign manufacturer; and the case therefore is only an authority as to the liability and position of a commission agent with instructions to place an order. In determining whether the agent in the case provided for by cl. 1 of para. 2 of s. 230 of the Contract Act, is personally liable, the terms of the contract itself where there is a written contract and the circumstances of the case where it is not in writing, and the intention of the parties must be looked at, and if those terms and intentions are such as to rebut the fact of his being personally liable, he will not be held to be so.

Where the principal is not disclosed.—Secondly, where the agent contracts for a principal but does not disclose that principal's name, the presumption is that the agent will be liable,[3] although this presumption is rebuttable. In *Hanson* v. *Robdean*,[4] where the plaintiff bought a post obit bond at an auction, where the defendant acted as auctioneer, and the bond not being assigned within the time agreed upon by the conditions of sale the plaintiff brought an action against the auctioneer. The name of the principal was not mentioned at the time of the sale, and one of the conditions was, that £25 per cent., should be paid as a deposit, but although the plaintiff was to give £645 for the bond, only £50 was paid down, which it was proved the defendant agreed to accept as a deposit. The defendant contended that the principal, and not the auctioneer, was liable to an action. Lord Kenyon, said, "where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such case the purchaser is entitled to look to him personally for the completion of the contract." In *Franklyn* v. *Lamond*,[5] which was a suit brought against some auctioneers for not transferring certain railway shares sold by them to the plaintiff; it appeared that the plaintiff bought at auction three lots of one hundred railway shares each, one of the conditions of sale being "the balance of the purchase money shall be paid at the office

[1] 1 Ind Jur, 405
[2] I. L R, 13 Bom, 470.
[3] Ind. Contr. Act, s. 230, para., 2.
[4] Peake's N. P. C., 163
[5] 4 C. B, 637.

of the auctioneers on the day following the sale. except in cases where any special transfers are required, and to such the utmost expedition shall be given." After the sale the plaintiff received the three hundred shares, together with a bill of parcels describing the transaction as a sale of "three hundred shares," and paid the price. The name of the owner of the shares was not disclosed at the time of sale, but upon the plaintiff applying for a transfer, the constitution of the Company requiring a transfer by deed, the auctioneers informed him that they were only acting as agents in the transaction, and referred him to their principal. In an action against the auctioneers for not transferring, held that they had not disclosed their principal at the time of the sale and were therefore personally liable. In *Pater* v. *Gordon*,[1] decided by the Madras High Court in February 1872 previously to the Contract Act, the defendants who were known by the plaintiffs to be acting as agents for the captain and owners of the ship Durley agreed with the plaintiffs to carry certain goods of the plaintiffs on board the ship from Madras to Calcutta. The defendants did not at the time of the contract in terms say that they contracted only as agents, and the plaintiffs did not know the names of the owners, or of the captain. The question referred to the High Court was, whether the facts above stated showed a sufficient disclosure of the defendant's principals to bring the case within the rule relating to contracts made by agents on behalf of disclosed principals. The Court held. that in the absence of anything more than knowledge that the defendants were acting as agents of the master and owners of *a* ship in the Madras roads, a decision declaring the agents liable, was strictly in accordance with English law. A case[2] lately decided by the Appeal Court, on reference from the Calcutta Court of Small Causes, has, however, decided that in the following written contract the broker did not disclose his principal and was therefore liable. There, the contract was: "Sold this day by order and for account of E E. Gubboy to my principal 4 per cent. G. P. N.'s for 200,000, at 98-11 clear of brokerage.

(Sd.) A. T. Avetoom, Broker."

This note was endorsed by way of acceptance "A. T. Avetoom for principal." The plaintiff sued the defendant who was a broker, and who was acting for both parties for damages for failure to take up his contract for the purchase of these Government Securities. The defendant at the time of the delivery of the broker's note to the plaintiff informed the plaintiff that he was unable to give the name of his principal and said to him, "if you won't accept the contract you are at liberty to do so"; on the date for delivery the plaintiff tendered the paper to the defendant, and he refused to accept it, as he considered he was not personally liable under the contract. He, however, 1 month and 24

[1] 7 Mad. H C, 82; 7 Mad Jur, 215

[2] *Gubboy* v. *Avetoom*, to be reported in I. L. R., 17 Calc.

days after the contract disclosed his principal. The Chief Judge held that section 230 of the Contract Act assumed full knowledge on both sides that the agent is entering into a contract only as agent for some principal whose name he does not disclose, and there being no disclosure of the principal's name at the time the contract was made, the presumption was that the broker was liable, a subsequent disclosure being insufficient to rebut the presumption, and decided the case in favour of the plaintiff subject to the opinion of the High Court as to whether or not upon the terms of the contract as they appeared on the face of the sold note, and on the terms of s. 230 of the Contract Act his judgment was correct. The case was heard by the Chief Justice and Mr. Justice Pigot, and in the argument the cases of *Southwell* v. *Bowditch*,[1] *Gadd* v. *Houghton*,[2] *Fleet* v. *Murton*,[3] *Soopromonian Setty* v. *Heilgers*,[4] *Mackenzie, Lyall* v. *Lang Moir and Company*,[5] *Pike* v. *Ongley*,[6] and *Paice* v. *Taylor*,[7] were cited, the Court held that there was on the contract nothing to rebut the personal liability of the broker; the words "A. T. Avetoom for principal," endorsed on the contract merely showing that the broker was acting for a real principal; and were not sufficient to rebut the presumption arising under s. 230 of the Contract Act, which presumption only arises when there is a principal—and further that the case of *Fleet* v. *Murton* and *Pater* v. *Gordon*,[8] were sufficient authority to show that the agent might be liable notwithstanding words such as were used in the contract before the Court.

The presumption of the agent's personal liability is capable of being rebutted.—Where the contract is in writing the presumption that the agent is personally liable may be rebutted by the terms of the contract itself, and to that end the whole contract will be looked into. Thus in *Mackinnon, Mackenzie and Company* v. *Lang, Moir and Company*,[9] a case on a charterparty, the plaintiffs agreed "as agents for owners of the steam ship Oakdale," and the charter provided that the owners should bind themselves to receive the cargo on board, and that the master on behalf of the owners should have a lien on the cargo for freight; the charterparty was signed by the plaintiffs and defendants in their own names; the plaintiffs sued the defendants for breach of the charterparty in refusing to load, it was held that the plaintiffs on the face of the contract clearly indicated that they were acting as agents and that the contract was entered into by them on behalf of their principals. They were therefore held to be not in a position to sue: and the right to sue and the liability to be sued being reciprocal, they would in the converse case have been held not liable to be sued. So also in *Soopromonian Setty* v. *Heilgers*,[10] it was held that

[1] 45 L. J. C. P., 630; L. R., 1 C. P., 374.
[2] L. R., 1 Ex D., 357.
[3] L. R., 7 Q. B., 126.
[4] I. L. R., 5 Calc., 71.
[5] I. L. R., 5 Bom., 584.
[6] L. R., 18 Q. B. D., 708.
[7] L. R., 5 Ex., 173.
[8] 7 Mad. H. C., 82, 7 Mad Jur., 215.
[9] I. L. R., 5 Bom., 584.
[10] I. L. R., 5 Calc., 71.

the presumption arising under s. 230 was rebutted by the terms of the contract itself. There the defendants "as agents for and on behalf of the owners of the steamship Lumley Castle" chartered the said steamship to the plaintiffs for five months, the charter providing that the steamer should be provided with a proper and efficient crew of seamen, engineers, stokers, firemen, and other necessary persons for working cargo with all despatch; and that in taking in and discharging cargo, the master and his crew with his boats should aid and assist to the utmost of their power, and that the owners or agents of the steamship should be held responsible to the charterers for any incapacity, want of skill, insobriety or negligence on the part of the master, officers, engineers etc. of the ship, but the names of the principals were not disclosed in the charterparty, although their names were verbally disclosed before the charter was signed; it was there sought to hold the agents liable for refusing to supply stevedores and other persons in addition to the crew, it being contended by the defendants that they were not liable as parties to the contract. Mr Justice Wilson said:—"The liability depends on s 230 of the Indian Contract Act . .... the present contract is one in terms made by Messrs. Heilgers and Company as agents for and on behalf of the owners of the Steamship Lumley Castle. It is signed "F. W. Heilgers and Company, agents for owners of Steamship Lumley Castle." It follows, if the case be governed by the first part of the section, that they are not bound unless the terms of the contract are such as to show that they meant to bind themselves personally. I find nothing to that effect in the contract. On the contrary, I think, an intention not to bind themselves is plainly shown There are only two clauses in the contract which can be thought to point the other way, it is said "the said agents covenant and agree with the charterers in the manner following." I think that means that they covenant as agents for, and on behalf of their principals. The other clause is the later one, which says, that the master shall be responsible in certain instances, and again that the owners or agents shall be responsible for the consequences of certain kinds, I think the meaning is, that the owners contract that the master shall do certain things, and the owners contract that they or their agents shall make good certain losses. But it is necessary to look also at the second part of the section. It says "such a contract (that is, a contract by the agent personally) shall be presumed to exist," where any of three specified conditions exists. I think that means that such a contract shall be presumed to exist *unless the contrary appears*. That seems to me the natural meaning of the words. And further it is legitimate here to refer to the Indian Evidence Act, ... an Act having specially to do with presumptions. Section 4, says 'whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved.' We may I think properly apply the same construction to the section of the Contract

Act, and presume the agent to be personally liable, unless in any of the specified cases an intention to the contrary is shown. Now one of these specified cases is, where "the agent does not disclose the name of his principal." Two meanings have been proposed for those words. Counsel for the plaintiff, Mr. Hill, says they mean (in the case of a certain contract) where the name of the principal is not disclosed on the face of the contract. Mr. Phillips, says that any disclosure is sufficient I am inclined to think Mr. Hill's view is right, though it is not necessary, for the reasons I shall state, to decide the point. But I incline to think that these words must be read subject to the provisions of s. 92 of the Evidence Act, and that if on the face of a written contract, an agent appears to be personally liable, he could not escape liability by the evidence of any disclosure of his principal's name apart from the document. Still, if this be so, if this is a contract on behalf of an undisclosed principal, so as to bring the case within the second clause of the section, I think the defendants are, nevertheless, secured against personal liability, because the *primâ facie* presumption of an intention to contract personally is rebutted by the language of the contract itself. If Mr. Phillips' contention be right, and the disclosure of the principal may, to satisfy the section, be in the document or outside it, then the matter is clear. The agents did not disclose the names of their principals at the time of the contract, and the case falls within the first, not the second clause of the section; upon any view I think that the defendants are entitled to have the suit dismissed."[1] So also in *Hasonbhoy Visram* v *Clapham*,[2] where Finlay Muir and Company "as agents for the master and owners of the Steamship Hutton," let the ship to one Essa Ahmed for three and not more than four months, for Rs. 15,000 per month, payment thereof to be made in cash fortnightly in advance to owner's agents in Bombay. Messrs. Finlay Muir and Company signing the charter as "agents for the master and owner of the Steamship Hutton" Latham J, held them not to be liable on the contract under s 230 of the Contract Act, although they were liable under s. 235: the case being in his opinion, having regard to the language of the instrument, even stronger than the cases of *Soopromonian Setty* v. *Heilgers*,[1] *Mackinnon, Mackenzie and Company* v. *Lang Moir and Company*,[3] which cases his Lordship said agreed with the English decisions of *Fleet* v. *Murton*,[4] *Wagstaff* v. *Anderson*,[5] and *Hutchinson* v. *Tatham*;[6] adding that he could not agree with Mr. Pollock in his work on Contracts at p. 121 where it is suggested that there

[1] *Soopromonian Setty* v *Heilgers*, I L R., 5 Calc., 71.
[2] I. L R., 7 Bom, 51
[3] I. L. R, 5 Bom., 584
[4] L. R, 7 Q B, 126.
[5] L. R, 5 C. P. D., 171.
[6] L R, 8 C. P., 482.

was a possible difference between the English and Indian law as to the liability of agents for an undisclosed principal; and that he was unable to consider the weight of Mr. Pollock's opinion as counterbalancing that of the two Indian decisions referred to, with which he agreed, and as further Mr. Pollock did not appear to have considered the effect of the words "shall be presumed to exist," or what evidence is sufficient to displace the presumption. This point was previously referred to by Bayley J., in *Purmanandass Jivandass* v. *Cormack*.[1] In the case last mentioned it has been held that sub-clause 2, section 230 is inapplicable when the agent has made himself personally liable by a written agreement, it being in such a case incorrect to presume a contract on the agent's part when he has made an express contract on which he is liable.[2]

What is sufficient disclosure.—As to whether the disclosure of the name of the principal must be on the face of the contract to meet requirements of section 230, the Bombay High Court do not consider it necessary that in the case of a written contract, the disclosure must be on the face of the contract itself, as was thrown out in *Mackinnon, Mackenzie and Company* v. *Lang Moir*,[3] Mr Justice West has decided that actual knowledge of the principal's name is equivalent to disclosure. As to this, his Lordship says:—"A presumption, it is said, arises that an agent may sue and be sued where he has not disclosed the name of his principal. "Disclosure," no doubt, means to make known, and here perhaps, there was no declaration—probably not. But the case may be supposed of the agents having contracted with the same charterers for the same ship shortly before, or of the charterers to the agent's knowledge being by other means acquainted with the owner's names. In such a case a disclosure would be impossible, yet I do not think that the presumption would operate. The essential point is the knowledge, and here the name of the ship and the registry number being given, the defendants not only know that the agents were not owners, but could immediately find out, if they did not know before, whom the owners were. This I think was equivalent to actual knowledge, and actual knowledge is equivalent to disclosure, the sole object of which would be to convey such knowledge." Mr. Justice Wilson has, however, intimated in *Soopramanian Setty* v. *Heilgers*,[4] that no disclosure apart from the contract can relieve the agent from liability. On the other hand the Chief Justice Sir Comer Petheram in *Aveloom* v. *Gubboy*,[5] threw out in the course of the argument, that he was by no means prepared to say that the disclosure must be on the face of the contract. Peacock C J., has, in the case of *Cowie* v. *Dhurmsee Poonjabhoy*,[6] intimated, (though the intimation is *obiter* and the case was decided in 1866) that a contract made with

[1] I L. R., 6 Bom., (857).
[2] *Ibid*, p. (857).
[3] I L. R., 5 Bom., 584.
[4] I. L. R., 5 Calc., 71.
[5] To be reported in I. L. R., 17 Calc.
[6] 2 Ind Jur., N. S., 75, (86).

express reference to a principal, though not by name, would not render the agent personally liable as the agent of an undisclosed principal The express reference there referred to was in these words "as agents for the owners of the ship Sir Jamsetjee Family."

Effect of not enquiring whether broker is acting for himself or for principal where it is known that the broker does business in both ways — Although as a general rule, a person contracting with an agent is not bound to enquire who his principal is, yet a sale by a broker in his own name to persons who are aware that the broker is in the habit of dealing both for principals and on his own account, has been held in England not to convey an assurance that he is selling on his own account, but is on the contrary equivalent to an express intimation that the property being sold is either the property of the broker or the property of a principal who has employed him as agent to sell, and a purchaser who is content to buy on such terms cannot when the real principal comes forward, allege that the broker sold the property as his own Bnt if he desires to deal with the broker as a principal and not as agent in order to secure a right to set off he is put upon enquiry; and if the broker refuse to state whether he is acting for himself or for a principal, the buyer may decline to enter into the transaction, but if he choses to purchase without enquiry, or notwithstanding the broker's refusal to give information, he does so with notice that there may be a principal for whom the broker is acting as agent [1]

Local custom in case of hundis Custom not to disclose may free the agent from liability.—But notwithstanding an agent is in general liable to third persons on notes or contracts entered into with them in his own name, where there is a local custom or usage for such agents to issue hundis in their own names without making themselves liable thereby, such custom will prevail [2] Thus in *Hari Mohun Bysak* v. *Krishna Mohan Bysak*,[3] Hari Mohun and another who were gomastas of the acceptor drew a hundi in their own names in favour of the plaintiff payable 60 days after date, which was accepted by one Sham Sundar Bysak. Some months after the hundis became due, the acceptor paid the drawees and afterwards became insolvent. The drawees alleged that ten months after the hundi became due they gave notice to the drawers and to the acceptor that unless they paid up, a suit would be brought against them The suit was brought and the drawers contended that they drew as agents, and that therefore according to mercantile usage at Dacca at which place the bill was drawn, they were not liable; the usage being for agents to draw hundis on their principals without

[1] *Cooke* v *Eshelby*, L R, 12 App Cas., 277

[2] Ind. Contr. Act, s. 2. Act XXVI of 1881, s. 1.

[3] 9 B L R App, 1.

disclosing the fact in the hundi; and that on proof of such custom the drawer was not liable. Evidence was given to show that Sham Sundar wrote the body of the hundi, and that the drawers were his gomastas and were living with him. The Subordinate Judge found in favour of the custom and held the defendants not liable; the District Judge reversed this decision, finding that the custom probably existed, but stating that the defendants had not signed as gomastas. On appeal, Glover J., said:—"The Judge disposed of the case on the technical rules of English law, and took no notice of the evidence on the record as to the prevailing local custom; he decided against the defendants simply on the ground that the bill does not show that it was drawn by the defendants as the agents of Sham Sundar. It has been more than once decided by this Court, that the local custom in such matters is to prevail, and that the Mofussil Courts are not bound by the strict technicalities of English law." And after referring to the case of *Pigou* v. *Ram Kishen*,[1] which his Lordship said was *obiter* as to the rule that an agent signing a bill of exchange in his own name cannot set up that he signed as agent, held the defendants not liable.

Grounds on which English cases on undisclosed principals are decided.—The cases in England on the liability of a broker who does not disclose his principal are decided either on the ground that he is personally liable by means of some words appearing on the face of the contract; or from some implied or understood contract arising from the usage of trade.[2] This is seen from the cases of *Southwell* v. *Bowditch*[3] and *Pike* v. *Ognly*,[4] but to make him liable on the custom, the custom must be proved. In the former case the words "Sold by your order and for your account to my principals," the contract being signed in the broker's name without any words descriptive of his office, were held by the Court of Appeal in the absence of proof of the custom referred to, to be insufficient to make the broker personally liable. The liability, however, in this country entirely depends on s. 230 of the Contract Act, which was in all probability based on the custom of trade in force in England.

Where there is a principal disclosed, who cannot be sued.—Next as to the agent's liability where the principal though disclosed cannot be sued.[5] This liability appears to answer to the rule in English law, that persons though contracting as agents, are nevertheless liable where there is no responsible principal to resort to. And may be illustrated by the following cases. Thus in *Burrell* v. *Jones*,[6] the solicitors of the assignees of a bankrupt tenant, upon

[1] 2 W R., 301.

[2] Cases on usage: *Humphrey* v. *Dale*, 7 E. & B., 266; E. B. & E., 1004. *Fleet* v. *Murton*, L. R., 7 Q B., 126.

[3] 45 L. J. C P. 630; L. R., 1 C. P., 374.

[4] L. R, Q B. D., 708.

[5] Ind. Contr., Act, s. 230, para. 2 (ol 3).

[6] 3 B & Ald., 47.

whose land a distress had been put in by the landlord, gave the following written undertaking:—"We, as solicitors to the assignees undertake to pay to Mr. Burrell his rent, provided it do not exceed the value of the effects distrained." Holroyd J., said:—"I am of opinion that the defendants (the solicitors) are personally liable If they are not, nobody is bound by the undertaking; for it is perfectly clear that the assignees are not bound." So also by cases of the class of *Eaton* v. *Bell*,[1] where an Inclosure Act empowered the Commissioners to make a rate to defray the expenses of passing and executing the Act, and enacted that persons advancing money should be paid out of the first money raised by the Commissioners. Expenses were incurred in the execution of the Act before any rate was made. And to defray these expenses, the Commissioners drew drafts upon their bankers requiring them to pay the sums therein mentioned on account of the public drainage, and to place the same to their account as Commissioners. The bankers during a period of six years continued to advance considerable sums by paying these drafts The Court held the Commissioners personally liable. Bayley J, said:—The form of the draft is "to pay A. B, or bearer on account of the public drainage." The persons, therefore, who signed that order, assert that the money is to be applied to the purpose of the public drainage. The draft then goes on "and place the same to our account as Commissioners of the Inclosure Act" Therefore the money is placed to their debit in the account, which they have, as Commissioners It does not say, "place the same to the account of the inclosure," but "to our account as Commissioners" Now the defendants (the Commissioners) must have known what they had collected, and what means they had of collecting more; and they ought to have taken care before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts. So in *Horsley* v *Bell*,[2] where an Act of Parliament was passed to make a brook navigable, and the defendants, amongst others, were named as Commissioners to put the Act in execution; the Commissioners being empowered to borrow money on the tolls to arise from the navigation. Large subscriptions were made, and the work was begun. The Commissioners appointed a treasurer and a surveyor. The defendants were, or represented, all the acting Commissioners, who employed the plaintiff to make cuts on different parts of the brook, and gave orders at their several meetings Several orders were made at different meetings, and by such of the defendants as were present at those meetings, but none of the defendants were present at all the meetings, or joined in all the orders; but every one of them were present, and joined in making some of the orders. The plaintiff sued all the acting Commissioners. The Court held that the Commissioners who acted were personally liable. So where a hospital had

[1] 5 B & Ald, 34

[2] 2 Ambl, 769, see also *Cullen* v *Queensbury*, 1 Bro. Ch. Rep, 101.

been set on foot supported by voluntary contributions; its affairs being conducted by a committee appointed by the subscribers at large, one of the members of which was the defendant who usually presided at the meeting of the committee; at a meeting at which the defendant attended, the steward of the hospital produced a bill for bread supplied to the hospital by the plaintiff who was a baker; it did not, however, appear who had appointed the baker or who had ordered the bread. The plaintiff sued the defendant for bread supplied The jury found that the defendant had acted in such manner as to induce the plaintiff to believe that he was to look to him for payment, and judgment was given against the defendant; on appeal this judgment was affirmed;[1] this liability may also be illustrated by such cases as *Kelner* v. *Baxter*,[2] where there is no principal existing at the time of the contract but the principal comes into existence afterwards.

Liability of public agents in contract.—There appears to be no distinction made in the Contract Act between the liability of a public and a private agent. The rule of English law as to this is, however, different; under that law agents of Government, from the supposition that their office excludes the presumption of credit being given to them personally, are not held liable for contracts made by them in their public capacity, although there be no other person against whom a legal remedy lies to enforce the contract.[3] Previously to the passing of the Contract Act, however, there appears to have been one case decided in this country on the basis of the English rule.[4] There are also certain *dicta* unnecessary, however, for the decision of the case in the case of the *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*,[5] which seems to indicate that the rule of English law is recognizable in India; the question raised in that case was the converse one, namely, whether the *Secretary of State for India in Council* was liable for the damage occasioned by the negligence of servants in the service of Government assuming them to have been guilty of such negligence as would have rendered an ordinary employer liable. It was there contended,[6] that the Secretary of State, as regards his liability, must be considered as a *public officer* employed by the State, the Court, however, decided that the East India Company were not the public servants of Government, and therefore did not fall *under the principle of the cases with regard to the liabilities of such persons.* It cannot, however, be safely said that the foregoing case and *dicta* are sufficient since the passing of the Contract Act

[1] *Burls* v. *Smith*, 7 East, 705 See also *Parrott* v *Eyre*, 10 Bing., 283.

[2] L. R., 2 C. P., 174.

[3] Paley on Pr & Ag, 374. *Goodwin* v. *Robarts*, L. R., 10 Ex., 76. *Twycross* v. *Dreyfuss*, L. R., 5 Ch. D., 605. Evans on Pr. & Ag, 352.

[4] *Sreenath Roy* v *Ross*, 4 W R., S. C. Ct. Ref., 13, (16)

[5] *Bourke's Rep.*, 166.

[6] *Bourke's Rep.*, (185), (188), (188).

to free from liability an agent of Government who has not disclosed his principal. The position of the Secretary of State in this country is different to that of the Sovereign in England; for in some cases the former can be sued in this country,[1] whereas in England the Sovereign cannot be sued, the only remedy for the subject being by a Petition of Right[2] *Possibly*, having regard to the position of the Secretary of State, a public agent, a servant for the Secretary of State, might not be held personally liable for not disclosing his principal when acting within his powers, where the act done or contract entered into is with reference to what are usually termed the Sovereign powers of Government; and would be held personally liable where the act done or contract entered into by him on behalf of the Secretary of State is one in which the Secretary of State, although possessing Sovereign powers, is not acting with such powers, but in the conduct of an undertaking which might be carried on by private individuals However, unless the distinction I have suggested, exists, there seems under the Contract Act, no reason to suppose that an agent of Government, is in any better position than a private agent, and unless the public agent discloses his principal, he would be *primâ facie* liable on his contract

Liability of Commission Agents — The liability of a commission agent through whom goods have been ordered to the person giving the order, is explained in the case of *Mahomed Ally Ebrahim Pukhan* v *Schiller Dosogne and Company*,[3] there the defendants traded in Bombay as merchants and commission agents under the style of Schiller Dosogne and Company, being a branch of a French firm trading in Paris under the same name, of which firm also the defendants were members. The Paris firm were agents of certain manufacturers in zinc. The plaintiff, a Bombay merchant, ordered out 48 casks of zinc through the defendants' firm in Bombay by an indent order in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below," these terms amongst other matters limited the time within which the shipment was to be made. The plaintiff later on consented to an increase being made to the original price fixed on. The defendants having communicated with their Paris firm wrote to the plaintiff "We have the pleasure to inform you that our home firm has reported by wire, 'Placed at your increased limit'" Subsequently the defendants wrote to the plaintiff saying that the manufacturers could not fulfil the order in the time agreed upon, asking whether he would extend the time or cancel the indent. Simultaneously the plaintiff wrote to the defendants saying that as the time had been exceeded he would purchase zinc in the market on the defendant's account. This the plaintiff did and sued the defen-

[1] See *Secretary of State* v *Hari Bhanji*, I L R 5 Mad, 273

[2] *Macbeath* v. *Haldimand*, 1 T. R, 172

[3] I. L R., 13 Bom, 470

dants to recover the difference in price as damages on account of the defendants having failed to perform their contract for the delivery of the zinc. The Chief Judge of the Small Cause Court, who referred the question to the High Court was of opinion that the plaintiff had employed the defendants as his agents only to forward his order to the Paris firm, who were in fact the principals in the contract of agency to deal with the manufacturers and were disclosed as such on the indent; so that even as agents the Bombay firm would be liable to the plaintiff for their misconduct only in the transmission of the order to, and the replies from, the Paris firm, and not for the misconduct of the latter firm in conducting the business of the agency with the manufacturers; whilst neither the Bombay firm, nor the Paris firm rendered themselves liable as vendors to the plaintiff upon a contract to sell and deliver; and as the damages claimed were claimed as arising from breach of contract of sale and not on a contract of agency he dismissed the suit contingent on the opinion of the High Court as to the correctness of his decision. Sarjent C. J., held that neither the defendants, nor their Paris firm had entered into any contract of sale on which they were liable to the plaintiff, they having only constituted themselves his agents to place the order, *i. e.*, to effect a contract of purchase on his account with the manufacturers of the zinc, and consequently the action brought for breach of contract would not lie. This decision of his Lordship was based on the case of *Ireland* v. *Livingston*,[1] as viewed by *Casseboglou* v. *Gibbs*.[2] With regard to the liability of a commission agent in Bombay who accepts a commission to order out goods at a fixed rate, and undertakes that they shall be invoiced to the person giving the order at that rate, he has been held (in the absence of a usage to the contrary) not to have fulfilled his contract by obtaining goods answering to the terms of the order from another firm in Bombay and tendering them to the person giving the order, and has been therefore held liable for damages.[3]

Liability in cases of warrant of authority.—We next come to the question of the liability of a pretended agent, in such case there is no doubt that the third person has a remedy in tort, but by a fiction of law he is also given a remedy *ex contractu* on an implied promise. Here the third person may waive the tort and proceed in contract. Thus it is an actionable wrong to retain money paid by mistake, but there is also a fiction of a promise implied in law to repay such money, which affords a remedy by suit on an implied contract in almost all cases in which a defendant has received money which he ought to refund, and even where goods taken or retained have been converted into money

[1] L. R., 5 H L, 395

[2] L. R., 11 Q. B. D., 797.

[3] *Bombay United Merchants Co.* v. *Doolubram Sukulchand*, I. L R., 12 Bom., 50

There is also a similar fiction of law in the case of an ostensible agent obtaining a contract in the name of a principal whose authority he misrepresents, in which class of case the agent is clearly liable in tort for an action in deceit, but that liability being purely a tort, would not extend to his executors, nor could he be held personally liable on a contract which he purposes to make in the name of an existing principal, so to meet these difficulties, the law implies on his representation a warranty that he has authority from the person he names as his principal, on which warranty he or his estate is answerable *ex contractu*[1] The principle of waiver of tort applies only to cases of implied contracts, and has been well stated as follows:—Where the circumstances, under which the law will imply a promise and so raise a contract which does not exist in fact, are such as also to fall within the definition of tort, the party injured may sue in tort, or if he pleases may waive the tort and sue in contract on the implied promise[2] To take an example of the case of the agent's liability for a misrepresentation; the Contract Act by s 235 lays down that a person who untruly represents himself to be the authorized agent of another, and thereby induces a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing[3] The rule thus laid down is based on the case of *Collen* v. *Wright*,[4] which case has been recognized and slightly extended by more modern decisions,[5] the present effect of which is similar to the rule in the Contract Act, and is set out clearly in *Firbank's executors* v. *Humphreys*[6] as follows: "Where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that that assertion, and the assertion turns out to be untrue to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is therefore liable personally for the damage that occurs" In that case the plaintiff sued to recover damages against five directors of the Charnwood Forest Railway Company on the ground that they had represented to him that certain certificates for debenture stock of the Company were good and valid certificates, and were issued under the borrowing power of the Company, and that they, the directors, had power to issue the certificates to the plaintiff. The facts were, that one Firbank had contracted to make a railway, and did work for

[1] Pollock on Tort, p 442

[2] Piggott on Tort, p 34

[3] Ind. Contr. Act, 235.

[4] 7 E. & B., 701. 8 E & B, 647

[5] *McCollin* v. *Gilpin*, L R., 6 Q. B. D., 516 *Cherry* v. *Colonial Bank of Australasia*, 38 L J P. C., 49 *Richardson* v *Williamson*, L. R., 6 Q B, 276

[6] L. R, 18, Q B. D., 54

which he was entitled to be paid cash. The Company not being in a position to pay, an agreement was made during the progress of the works by which Firbank agreed to accept debenture stock in lieu of cash. The defendants who were directors of the Company, thereupon issued to Firbank certificates for the agreed amount of debenture stock. Such certificates being signed by two of the defendants. At that time, although the fact was not known to the defendants, all the debenture stock which the Company were entitled to issue had been issued, and consequently that which the plaintiff received was an over issue and valueless. The Company went into liquidation, but valid debenture stock retained its par value; held that the defendants were liable on their implied representation that they had authority to issue valid debenture stock which would be a good security, and that under the circumstances the damages were the nominal amount of the stock which Firbank ought to have received under his agreement So also where the defendants, the agents of an American Insurance Company, represented to the plaintiff, an insured, who had obtained a decree for £1,000 against the Marine Insurance Company, that they were authorized by the Company to offer £300 in settlement of the plaintiff's decreed claim, and the plaintiff relying upon the accuracy of the representation entered into an agreement for the settlement of the claim, but it subsequently turned out that the defendants were not authorized to make the agreement; it was held, in a suit brought against the defendants to recover damages for breach of warranty of authority, that the plaintiff was entitled to recover,[1] and this decision was upheld on appeal.[2] On a similar principle where the plaintiff lent £70 to a benefit building society, and received a receipt, signed by the defendants as two directors of the Society, certifying that the plaintiffs had deposited £70 for three months certain to be repaid with interest after 14 days' notice, and it appeared that the Society had no power to borrow money, and the plaintiff, being unable to recover the money lent, sued the defendants Cockburn C J., said:—"By the law of England persons who induce others to act on the supposition that they have authority to enter into a binding contract on behalf of third persons, on it turning out that they have no such authority may be sued for damages for the breach of an implied warranty of authority. This was decided in *Collen* v. *Wright* and other cases."[3] The case of *Collen* v. *Wright* has been followed in *Hassonbhoy Visram* v. *Clapham*;[4] see also the case of *Mohendronath Mookerjee*[5] decided previously to the passing of the Contract Act. The subject

[1] *Meek* v *Wendt*, L R, 21 Q. B D, 126

[2] W N., (1889), 14

[3] *Richardson* v. *Williamson*, L R, 6 Q B, 276. See also *Chapleo* v. *Brunswick Building Society*, L R, 6 Q. B. D., (717)

[4] I. L R., 7 Bom, 65.

[5] 9 W. R, 208.

of the liability of an agent who has acted without authority is exhaustively discussed in *Smout* v *Ilbery*,[1] there Baron Alderson says:—"There is no doubt that in the case of a fraudulent misrepresentation of his authority, with an intention to deceive, the agent would be personally responsible But independently of this, which is perfectly free from doubt, there seem to be still two other classes of cases, in which an agent who without actual authority makes a contract in the name of his principal is personally liable, even where no proof of such fraudulent intention can be given. First, where he has no authority, and knows it, but nevertheless makes the contract as having such authority. In that case on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his own knowledge; and it is but just, that he who does so should be considered as holding himself out as one having competent authority to contract, and as guaranteeing the consequences arising from any want of such authority. But there is a third class, in which the Courts have held that where a party making the contract as agent *bonâ fide* believes that such authority is vested in him, but has in fact no such authority, he is still personally liable In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is a wrong, differing only in degree, but not in essence from the former case, to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And if that wrong produces injury to a third person, who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally liable, will be found to arrange themselves, under one or other of these three classes."

Measure of damages for breach of warrant of authority.—The injured person is entitled to all the damages which are the natural and proximate consequence of the false assertion of authority, for, as says Lord Esher in *the National Coffee Palace Company*.[2] "The measure of damages in actions for breach of warranty is always the same in every case, I will not consider what theoretically it ought to be, but I say we must decide it according to the rule which has been followed for a series of years. *Spedding* v. *Nevell*,[3] *Goodwin* v. *Francis*[4] are cases

[1] 10 M & W., 1.
[2] L. R., 24 Ch. D., 371.
[3] L. R., 4 C. P., 212.
[4] L. R., 5 C. P., 295

in which the plaintiff was the intended purchaser, and *Simons* v. *Patchett*[1] was a case in which the plaintiff was an intended vendor, and in all these cases the Court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have: in other words what the plaintiff would have gained by the contract which the defendant warranted should be made."[2]

Liability of agent acting under innocent mistake. Non-liability where the injury is not caused directly and solely by his act.—A person acting as agent and *bonâ fide* believing himself to have due authority from the principal, when in point of fact he has no authority, and who is therefore acting under an innocent mistake, is nevertheless liable to third parties for injuries caused by his acts, on the principle that where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by inducing the other to place a false confidence in his acts and to repose upon the truth of his statements. And his misrepresentation may, as will be next seen, have the effect of vitiating any contract entered into by him on his principal's behalf within the authority granted.[3] But where the injury is not caused directly and solely in consequence of any representation of the agent, but rather in consequence of a letter addressed to the person suffering the wrong delivered by the agent, the latter will not be held liable for any loss which is incurred. Thus where two letters were presented to one Mooney, one addressed to himself, and the other to the manager of the Mussoorie Savings Bank both purporting to be written by Rai Kuar Bir Singh. In the letter to Mooney, he was requested to deliver to the manager of the Bank the letter addressed to him, and the letter to the manager contained a request for payment of Rs. 2,800 through Mooney—Mooney delivered the letter to the manager who upon the strength of it made over the sum asked for to Mooney, who gave a receipt for the same in the name of Rai Kuar, and afterwards handed over this sum to the person who brought the two letters; and it subsequently was discovered that the letters were forgeries, and the Bank sued Mooney to recover the money paid to him: held that in presenting the letter, in receiving the notes, and in granting a receipt for them, the defendant was in some sense an agent of Rai Kuar, but inasmuch as the notes were given on the authority of the letter addressed to the plaintiff himself, and not in consequence of any representation made by the defendant, the latter could not be held liable for the loss sustained by the former.

[1] 7 E. & B., 568.

[2] See also *Meek* v. *Wendt*, L. R., 21, Q. B. D., 126, *Hughes* v. *Graeme*, 83, L. J. Q. B., 335. *Randell* v. *Trimmer*, 18 C. B., 786. *Pow* v. *Davis*, 30 L. J. Q. B., 257

[3] Ind. Cont. Act, ss. 18, 19, 238.

[4] *Mooney* v. *Mussoorie Savings Bank*, 6 All. H. C., 319.

Effect of misrepresentation and fraud of agent.—Misrepresentations and frauds committed by agents acting in the business of their prineipals' and within the authority given to them have the same effect on their contracts, as though the fraud or misrepresentation had been committed by the principal [1] But although this is so, the agent is nevertheless liable to third parties in damages for his misrepresentations; but it appears that he cannot be made liable for making a misrepresentation,[2] unless it is a misrepresentation in point of fact, and not merely in point of law. Thus in *Beattie* v *Ebury*[3] where three directors of a Railway Company opened on behalf of the Company an account with a bank, and sent a letter signed by the three as directors requesting the bank to honour cheques signed by the two of the directors and countersigned by the secretary. And the account having been largely overdrawn by means of such cheques, the bank sued the Company, recovered judgment and issued an elegit, but the proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable Vice-Chancellor Bacon held on the authority of *Collen* v. *Wright*,[4] *Cherry* v. *Colonial Bank of Australasia*,[5] *Richardson* v. *Williamson*,[6] that where agents or others acting on behalf of a Company, so act that, without any words to that effect, their acts amount to a representation that they have authority to enter into a contract upon which the dealings which may be in question are based, they incur a personal liability to make good the representation, and that therefore the defendants were bound to make good to the Bank the amount due to it, incurred upon the faith of their letter of authority. On appeal this decision was reversed, the Court holding that the directors were not personally liable for the debt under the letter of request, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a representation of fact, which the persons making it were bound to make good, but only a mistaken representation of the law; and moreover that, even if it had been such a false representation as the directors were bound to make good, the bank would have had no claim against them, since it had been able to enforce the same remedies against the Company as if the representation had been true.

Misrepresentation from a mutual mistake of law—Where there has been a misrepresentation arising from a mutual mistake of law the agent

[1] Ind Contr. Act, ss 138, 18, 19 *Grant* v. *Norway*, 10 C. B., 665. *Barwick* v *English Joint Stock*, Bk., L. R., 2 Ex, 262.

[2] Ind Contr. Act, s 18

[3] L. R, 7 Ch, 777.

[4] 8 El & Bl, 647

[5] L. R, 3 P. C, 24.

[6] L. R, 6 Q. B, 276

making such misrepresentation will not be held liable. Thus were the Llanidloes Company had power under its Acts to issue £100,000 preference shares and a large amount of ordinary shares; and by a later Act was amalgamated, together with other Companies, with the Cambrian Railway Company, at which time it had issued £85,000 preference shares, which were to rank as No. 1 Preference Stock, and £60,000 ordinary shares, which were to rank as No. 2 Preference Stock; and power was reserved by the Act to the Cambrian Railway Company to raise any capital which any of the Amalgamated Companies had power to raise before the amalgamation; the directors under a *bonâ fide* belief that they had power to raise the remaining £50,000 preference shares of the Llanidloes Company, and to make them rank with the £85,000 No. 1 Preference Stock, issued £15,000 preference stock and described them in the certificates, which were signed by the directors and the Secretary, as "No. 1 Preference Stock"; some of this stock was purchased by the plaintiff who, some 5 years before his suit, discovered, on a scheme filed in Chancery for arranging the affairs of the Cambrian Railway Company, that the Court had decided that the new stock was not No. 1 Preference Stock, but ranked below it and No. 2 Preference Stock. The plaintiff thereupon filed his bill alleging that he had been deceived by the form in which the stock had been issued and the certificates made, and praying that the Company, Directors and Secretary might be held liable for the misrepresentation. The Master of the Rolls held that the Company, Directors and Secretary were liable to make good the misrepresentation made to the plaintiffs, and either to issue No. 1 Preference Stock to them or repay them their purchase money. On appeal James L. J., held that to maintain the case of misrepresentation the representation must be wilful and fraudulent, and that the evidence in the case failed to prove that the plaintiff was in any way deceived by anything said to him; Bramwell L J., said, "If there has been a misrepresentation at all it is not a misrepresentation that he was getting this stock, but a misrepresentation, under a misconception in which he shared, as to the rights of the New £15,000 Stock." Their Lordships after making some strong remarks on the fact that the plaintiff had allowed 5 years to go by without complaint, after being informed that he had not had transferred to him the stock which he thought he was buying, reversed the decision of the Master of the Rolls.[1]

Agent not liable where third person induces belief that his principal only will be liable.—Where the agent has made a contract with a third person, who knows that he is an agent, and such third person induces the agent to act upon the belief that the principal only will be held liable, the agent will not be liable on the contract.[2]

[1] *Eaglesfield* v *Marquis of Londonderry*, L. R., 4 Ch. D., 693.

[2] Ind. Contr. Act, s. 234.

Liability to refund to true owner money paid over by mistake.—Where money or property has by mistake been paid or delivered to an agent for the use of his principal, if the agent pay the money or deliver the property to his principal he will be liable to refund or restore the same to the true owner;[1] and although s. 72 of the Contract Act makes no distinction in words between mistakes of fact and law, yet that section should be read with section 22; under the law of England regarding payments made by agents in mistake, the agent's liability appears from the reported cases to depend upon whether he makes the payment over to his principal innocently, *i. e.*, whether he does so before or after notice of the mistake. This distinction is apparent from the case of *Ex-parte Edwards in re Chapman.*[2] Further examples of this rule may be found in the cases of *Sharland* v. *Mildon,*[3] *Buller* v. *Harrison,*[4] and *Holland* v. *Russell.*[5] I have pointed out this distinction which arises if section 72 of the Contract Act applies alike to cases of principal and agent as well as to cases in which no agent is concerned, *i. e.*, in cases where the payment is made by mistake by one principal to another principal (as to which latter class of cases there is no doubt that it does apply), as in England there is an exception to the rule of law—that an agent who, by mistake, and before notice of the mistake, pays over to his principal monies paid to him for his principal's use by third persons is not liable to refund the sum so paid—which exception is that a broker or other agent who has paid over monies to another broker or agent before receiving notice of his mistake is liable to refund the sum so paid over where no principal's name appears; for in such case the matter is treated as being between two principals. This exception to which I have just referred is illustrated by the case of *Newall* v. *Tomlinson,*[6] decided in the Court of Common Pleas by Chief Justice Bovill, Mr. Justice Byles, Mr. Justice Montague Smith, and Mr. Justice Brett, there, the plaintiff and defendant both carried on business as cotton brokers; and the latter sold to the former a large quantity of cotton; no bought or sold note was signed, but an invoice was sent to the plaintiff in which the defendant's clerk added up the weights erroneously, and charged for 325 hundredweight instead of 225 hundredweight the amount of cotton actually delivered. The plaintiff paid for the larger quantity, but afterwards found out his mistake, he having paid nearly £500 too much. The defendant refused to repay this sum on the ground that he had closed his account with his principal, for whom he had acted in the sale, before the mistake was discovered. The plaintiff sued the defendant to recover the amount; Bovill C. J., held that the universal rule of

[1] Ind. Contr. Act, s. 72.
[2] L. R., 13 Q. B D., 747
[3] 5 Hare, 469.
[4] 2 Cowp., 568.
[5] 1 B. & S., 424; 30 L. J. Q. B., 308; 32 L. J. Q. B., 297.
[6] L. R., 6 C. P., 405; 7 Mad. Jur., 38

law was that money paid under a mistake of fact can be recovered back. That the rule that an agent, paying over money to his principal before receiving notice not to pay it over cannot be made to refund it to another person, did not apply as the real principal's name never appeared, in the transaction, but that as the evidence shewed that the plaintiff and defendant had treated one another as principals, the plaintiff could therefore recover.

Plea of payment over where there is fraud.—That the plea of innocent payment over to the principal is of no avail where the latter is acting fraudulently, is seen from the case of *Shugan Chand* v. *The Government*,[1] there a treasury officer paid money under a mistake of fact to the defendant who was the innocent agent of a person who had contrived a fraud, and he was held on the authority of *Tugman* v. *Hopkins*,[2] entitled to recover under s. 72 notwithstanding that the plea of payment over to the defendant's principal was set up.

Money had for the use of the principal and not paid over.—And where an agent receives money for the use of his principal, from a third person, and does not pay it over he will be liable Thus where a debtor of the plaintiffs transmitted a sum of money to the defendant, who admitted having received it, and being afterwards informed that it was meant to be paid to the plaintiff, said that he would so pay it; and these statements were communicated to the plaintiff by the defendant's authority, held that on the defendants failing to pay, the plaintiff might sue him for money had and received, and that the defendant could not allege a want of consideration moving from plaintiff to himself, as the defendant being the agent of the plaintiff, that agency supplied the consideration.[3]

Liability of agent where he is a stakeholder.—Where an agent who is in the position of a stakeholder, receives a deposit to be paid over on fulfilment of a certain given condition, and pays such deposit over to his principal before the condition is fulfilled, he will be liable to refund to the person entitled to the money deposited.[4] Thus in *Essaji Adamji* v. *Bhimji Purshotam*,[5] the plaintiff purchased certain immoveable property at an auction sale and deposited with the auctioneer a portion of the purchase money. The vendor, however, refused to convey the property to the plaintiff, whereupon the plaintiff brought a suit against the vendor to recover the money deposited by him. The Court held that the money having been deposited with the actioneer as a stakeholder and not as an agent merely, and being in his hands, the action to recover it lay against the auctioneer and not against the vendor. The distinction between the liability of an agent and that of a stakeholder is referred to in *Bamford* v. *Shuttleworth*.[6]

[1] I. L. R., 1 All., 79
[2] 4 M. & G., 389
[3] *Lily* v. *Hays*, 5 A. & E., 548
[4] *Burrough* v. *Skinner*, 5 Barr., 2639 *Furtado* v. *Lumley*, L. T. Feb 1st, 1890, p 240.
[5] 4 Bom H. C. (O C J.), 125
[6] 11 A. & E., 926.

Liability to refund money paid to him under coercion—So also if money is paid over to an agent under coercion he must repay it.[1] The act charged as coercion must, however, be illegal.[2] Thus where a bailiff illegally compelled the plaintiff under a threat of distraining his goods, to pay him a certain sum of money, it was held that the fact of the bailiff having before the commencement of the action paid over the entire sum to the sheriff who had paid it into the exchequer constituted no defence to the action.[3] So also where certain trustees were to grant a lease to the plaintiff of a certain property in which one Clark had a contingent interest, and who was therefore a necessary party to the lease. And in order to procure his concurrence, Hudson the attorney for the trustees wrote to him stating the circumstances, in reply to which the defendant, the attorney to Clark, entered into correspondence with Hudson, requiring from him a copy of the will under which Clark was interested. For this, and for searching for the will, the defendant had a claim upon Clark, his client, and eventually it was agreed that Clark should grant and confirm on the terms, as the defendant contended, that all past costs, as well as those occasioned by such joining in the lease should be paid by the trustees, but as Hudson contended, only that such latter costs should be paid. The defendant sent his account of costs to Hudson who complained of the amount. The defendant declined to execute unless the costs were paid. The defendant subsequently obtained Clark's execution. Hudson then demanded the lease from the defendant and tendered him a smaller sum than that claimed; but as the defendant refused to give up the lease on such tender, Hudson paid the full amount claimed under protest, and then brought an action to recover the sum so paid or so much as was overpaid, the Court held he was entitled to recover.[4]

Refusal to pay over monies as directed by principal.—He will also be liable if he refuse to pay over to third parties monies directed to be paid to them by his principal. Thus in *Patorni* v. *Campbell*,[5] where one Calvo appointed the defendant his agent to receive payment in Mexico of the proceeds of the cargoes of a ship of which Calvo was the owner. The defendant received notice from the plaintiff that Calvo had assigned to him all the sums of money that might be due and owing or received on account of the said ship; and in pursuance of this notice, the defendant paid over to the plaintiff, from time to time, considerable sums of money. Subsequently the defendant was informed by Calvo that he had made a composition with his creditors, and amongst

[1] Ind. Contr., Act, s. 72.

[2] Ind Contr Act, s. 15.

[3] *Snowden* v. *Davis*, 1 Taunt, 359. See also *Miller* v. *Ants*, 1 Selw. N P., 92.

[4] *Smith* v. *Sleap*, 12 M. & W., 685.

[5] 12 M. & W., 277.

them with the plaintiff, and at Calvo's request, the defendant sent him an account of the sums he had paid to the plaintiff. Subsequently the defendant received from his agents abroad a bill of exchange for £733 drawn by them against the amount of a dividend on the value of a cargo of the same ship, and thereupon the defendant wrote to the plaintiff, stating that he should hold the same at his disposal, in virtue of the assignment, and also to Calvo, informing him that he should deliver the proceeds of the bill to the plaintiff when it became due. Subsequently the defendant received a letter from Calvo, in which, after stating that the plaintiff had been overpaid his debt, he expressly prohibited the defendant from paying over the amount of the bill, or any monies whatever to the plaintiff. The bill became due, and the defendant accordingly retained the proceeds in his hands, and refused to pay them over to the plaintiff, who in consequence sued him for money had and received to recover the amount thereof. A summons was taken out calling upon the plaintiff to interplead; but the Court refused to make any order, on the ground that Calvo was a foreigner out of the jurisdiction. Parke B., said, "This is not the case for an interpleader. The moment the defendant agreed to hold the bill for the plaintiff, it became his bill, just as if the defendant had paid him so much money." But where the agent does not accept the agency he will not be liable to the appointees even if he receive the money, thus in *Williams* v. *Everett*,[1] where one Kelly who resided at the Cape of Good Hope remitted on England to the defendant his banker in London, with directions to pay the amount of the bills in certain specified proportions to the plaintiff and other creditors who would produce their letters of advice from him on the subject, and desiring the defendant to put upon the back of the respective bills the amount paid to each person, and to cancel each bill paid off. The plaintiff, before the bills became due, gave notice to the defendant that he had received a letter from Kelly ordering payment of his debt out of the remittance, and offered an indemnity, if he (the defendant) would hand over one of such bills to him. The defendant refused so to do, or to act upon the letter written by Kelly, although he admitted the receipt of it, and the identity of the plaintiff, and although he subsequently received the money upon the bills. The plaintiff thereupon sued the defendant for money had and received to his use, contending that by the receipt of the money, the defendant had irrevocably acceded to the appropriation of it, as directed in the letter of advice from Kelly. Lord Ellenborough non-suited the plaintiff, considering that the defendant had renounced the terms on which the bills were remitted before the money was actually received, and it was therefore only money had and received to the use of the remitter of the bills, but his

[1] 14 East, 582

Lordship reserved the point. A rule was accordingly moved for to set aside the verdict. Lord Ellenborough C. J., said:—"It will be observed that there is no assent on the part of the defendant to hold this money for the purposes mentioned in the letter; but on the contrary an express refusal to the creditor so to do. If, in order to constitute a privity between the plaintiff and the defendant as to the subject of this demand, an assent express or implied be necessary, the assent can in this case be only an implied one, and that too implied against the express dissent of the party to be charged. By the act of receiving the bill, the defendant agreed to hold it till paid, and its contents when paid, for the use of the remitter. It is entire to the remitter to give, and countermand his own directions respecting the bill as often as he pleases, and the person to whom the bill is remitted may still hold the bill when received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by himself with the person who is the object of the remittance, he has precluded himself from so doing, and has appropriated the remittance to the use of such person. After such circumstance, he cannot retract the consent he may have once given, but is bound to hold it for the use of the appointee. If it be money had and received for the use of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be asked, *when* did it become so? It could not be so before the money was received on the bill becoming due; and at that instant, supposing the defendant had been robbed of the cash or notes in which the bill in question had been paid, or they had been burnt or lost by accident, who would have borne the loss thus occasioned. Surely the remitter Kelly, and not the plaintiff and his other creditors in whose favour he had directed the application of the money according to their several proportions to be made. This appears to us to decide the question, for in all cases of specific property lost in the hands of an agent, where the agent is not himself responsible for the cause of the loss, the liability to bear the loss is the test and consequence of being the proprietor, as the principal of such agent; ..... Here no agency for the plaintiff ever commenced but was repudiated by the defendant in the first instance. We are of opinion therefore, that upon no principle of law can the defendant be said to stand in such privity in respect to the plaintiff, as that the £200 claimed in this action can be said to have been money had and received to the plaintiff's use." He will not, however, be liable to the original remitter where there has been no *direct engagement* entered into by him to hold the money for the use of others. Thus in *Cobb* v. *Becke*,[1] the plaintiff Cobb being a defendant in an action at the suit of one Cutbush, and a Mr. Dally of Rochester, being Cobb's attorney, and the defendants Dally's agents in London, an order was made for staying proceedings on payment of debt and costs. Cobb paid money to Dally for this purpose, upon which Dally sent to

[1] 6 Q. B., 930.

the defendants his own cheque for £20, being somewhat more than the debt and costs, directing them to pay the debt and costs. They acknowledged the receipt to Dally by letter, and said that the money should be applied accordingly. Afterwards they retained it in satisfaction of a balance of general account due to them from Dally. Cobb then brought this action against them for money had and received, and at the trial it was found that the defendants knew the money remitted to them to be Cobb's, and a verdict was taken for the plaintiff, subject to a motion to enter a nonsuit. On a rule *nisi* being heard, it was said by Denman C J,: "If Cobb had transmitted the money direct to the defendants, or if he had desired Dally to transmit to them specifically, and they had received it as from Cobb and not as from Dally, doubtless they would have become Cobb's agents, and accountable to him for the appropriation of it. But upon the evidence it appears that Cobb paid the money to Dally for the purpose of paying the debt and costs, but without any specific directions through what channel it was to be remitted. The money appears to have been mixed with Dally's general funds; and he sent to the defendants his own cheque; he was at liberty to have sent the money through his bankers, or direct to Cutbush's attorney, or through any channel which he chose to select; and unless the person through whom he sent, be he who he would, became, by the employment of Dally, the agent of Cobb, it seems difficult to contend that the defendants became so ..... It it not pretended that an agent can delegate his authority, or that he can, by employing a third person to do the whole or any part of the business entrusted to him, make that third person an agent of the principal. But it is argued for the plaintiff, that Dally was merely the hand employed to forward the plaintiff's money to the defendants, to be by them applied in payment of the debt and costs If the facts warranted such a conclusion, doubtless this action might be maintained. But, as the facts shew that the plaintiffs employed Dally, and that Dally, and not the plaintiffs, employed the defendant, we are of opinion that no privity is established between the plaintiff and defendants." The rule for a nonsuit was therefore made absolute.

Liability to third persons in tort Liable for mis-feasance only — The agent is liable to third persons for mis-feasance only. The general rule on this subject is stated by Holt C. J., in *Lane* v. *Cotton*.[1] "A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it, but for a mis-feasance an action will lie against a deputy or servant, but not *quatenus* a deputy or servant, but as a wrong-doer." It is, however, essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, must prejudicially affect him in some legal right;

[1] 12 Mod, 473, (488).

merely that it will, however directly, do him harm in his interests, is not enough."[1] If, therefore, an agent while acting as such is guilty of any mis-feasance with reference to the property of third persons,[2] or if he dispose of property which may happen to be in his hands, but to which his principal has no title, or if in the course of his employment he be guilty of any fraud or misrepresentation he will be liable to third persons for all damages which they may sustain by reason of such his tortious act, whether such acts have been done *bonâ fide* by command of his principal and for his benefit,[3] or at the mere will and for the benefit of the agent himself.[4]

Liability of agent where both he and the person contracting with him are guilty of fraud against his principal.—The Ex-King of Oude gave orders to one of his officers Sufdur Ally, to procure the erection of certain buildings; Sufdur Ally made over to Gassem Khan, who was also one of the Ex-King's officers, the contracting for a portion of the work. The contract for this portion of the work was given a contractor, who alone signed the contract, it stipulating amongst other matters that Gassem was to be allowed Rs. 20,000 out of every Rs. 100,000 paid to the contractor. And by another agreement between the contractor and the Ex-King who was unable to read, it was arranged that an ameen appointed by Gassem should daily approve of the work done and reject any bad work or materials. The contractor executed some portion of the work which was frequently checked and examined by Gassem or his agents. Part of these works were rejected and rebuilt, but before completion he was discharged from further performance of the contract, and his accounts were made out and sealed by Gassem. The contractor then sued the Ex-King, Sufdur Ally, and Gassem to obtain payment for the work done under the contract, held that Gassem had not either by the terms of the contract or by his subsequent conduct whilst acting on behalf of the Ex-King made himself personally liable; and that the contract was of such a description that the contractor was not entitled to a decree against the Ex-King or Sufdur Ally, as both Gassem and the contractor were parties to a fraud on the Ex-King.[5]

Liability of master of vessels.—The master of a merchant ship is usually liable for all acts of negligence or mis-feasance on the part of the officers or crew of the vessel by which the cargo or the property of others is damaged.[6] And this is so as he and not the owners of the vessel has usually the power of

[1] *Rogers* v *Rajendro Dutt*, 2 W R, 51

[2] *Wise* v *Burn.*, 4 W. R, Rec R, 1

[3] *Mill* v *Hawker*, L. R, 10 Ex, 92

[4] *Perkins* v *Smith*, 1 Wils, 328

[5] *Bhogoban Chunder Sen* v *Badsa Ally, &c*, 1 Ind Jur O S, 103 As to agent's liability for misrepresentation see also *ante, pages* 383 *to* 385.

[6] *Maude and Pollock*, 154, where Molloy, B 2, C 8, s. 13, is cited

appointing his officers and his crew;[1] but in such cases as he has not that power it is probable that he would not be liable; for it is on the ground that a captain of a man-of-war has not the power of appointing his officers and crew, that he is not held liable for their mis-feasance or negligence.[2] But it has been held that the master of a merchant ship is not liable for trespass committed wilfully by his crew, that is to say, that where a member of his crew has done a wilful act of injury to another ship without the direction or privity of the master, the latter is not chargeable.[3]

Liability for false and fraudulent statements made with actual fraud. Liability for deceit —Although the term "action for deceit" is not one made use of in India; yet there is no doubt a suit for damages would lie, in the nature of an action of deceit, against an agent for making a false and fraudulent statement whereby a third person is induced to enter into a transaction and so sustains damage. A distinction must, however, be drawn between such a suit, and one to set aside a contract for misrepresentation;[4] in the latter case a plaintiff may succeed, although the misrepresentation was innocent; whereas on the other hand, the other class of suit is based on fraud and the fact that the plaintiff was deceived to his prejudice Such latter suits are usually brought when a transaction has been induced by fraud, but rescission of the contract is not competent to the party defrauded for some reason or another, *e. g.*, amongst others, for the reason shewn in *Peek* v. *Derry*,[5] a case next to be referred to. It is true that s. 238 of the Contract Act, enacts that mispresentations and frauds by agents acting in the course of their business for their principal renders a contract so obtained voidable at the option of the persons defrauded; but this would not prevent an agent being liable in tort for his action. A case of considerable importance (in which most of the authorities are referred to) on the question of the liability of directors for misrepresentation in an action of deceit is that of *Peek* v. *Derry*,[6] where it was held in the Court of Appeal, that a person was liable in an action for damages if he made a false statement which, though he did not know it to be false, he had no reasonable ground for believing it to be true. The House of Lords[7] displaced that view of the law and laid down that the Court is to be governed by the old rules as to an action of deceit, so that to make a person liable in such an action two things are necessary, *viz.*, the statement must be false, and must be made dishonestly. So that if a statement is untrue in fact, but believed to be true, though without any reasonable grounds for such belief, no action for deceit will lie. In that case the directors of a Tramway Company issued a prospectus bearing at

[1] *Lane* v. *Cotton*, 12 Mod, 489.
[2] *Nicholson* v. *Mouncey*, 15 East, 384
[3] *Bowcher* v. *Noidstrom*, 1 Taunt, 568
[4] Ind. Contr. Act, s. 238 & s. 18
[5] L R., 37 Ch. D, 541.
[6] L. R., 37 Ch. D., 541.
[7] *Derry* v *Peek*, L. R, 14 App. Cas, 337.

its head the words "Incorporated by Special Act of Parliment 45 and 46 Vic. authorizing the use of steam or other motive power," and stating in the body of the prospectus, "one great feature of this undertaking, to which considerable importance should be attached, is that by the Special Act of Parliament obtained, the Company has the right to use steam or mechanical motive power instead of horses," and further mentioning "the unusually favourable conditions as to motive power open to the Company." But in reality the Special Act authorized the use of steam power or other mechanical power only with the consent of the Board of Trade, and subject to periodical renewal of such consent, and also with the consent of two local corporations, and subject to such conditions as they might prescribe. At the time the prospectus was issued there was fair and reasonable expectation that all these consents would be given, but none of them had been given. The plaintiff took shares on the faith of this prospectus, and stated in his evidence that he was induced to take them by the statement that the Company had the right to use steam power, and also by his knowledge of, and interest in the locality, and his confidence in the character of the directors. The Board of Trade refused their sanction to the use of steam power and the Company was wound up. The plaintiff commenced an action to set aside the purchase, which was, however, prevented from being effectual, because the winding up petition of the Company was presented a few days before, he therefore brought an action against the directors claiming damages for their mistatement in the prospectus; it was held by the Court of appeal reversing the decision of Stirling J., that the directors were liable for the mis-statement, as it was made without reasonable ground for their believing it; but the decision of the Appellant Court was reversed by the House of Lords. It will be well, as the case in the Appeal Court sums up most of the authorities, to give an insight into the law laid down as to what is necessary to found an action for deceit, for the law as laid down was not disputed in any of the Courts.

Opinion of the Judges in Peek v Derry as to the requisites for an action for damages for deceit.—Stirling J., in the Court of first instance, stated the law on the subject to be as follows; he said:—"In order that the person who brings it (an action of deceit) may be able to maintain it, he must prove several things. First of all, complaining as he does of a statement which he says is untrue, he must prove that the persons whom he sues, actually made or are responsible for that statement. Secondly, he must show that that statement is untrue in fact. Thirdly, he must shew more than that, not merely that, but that it is fraudulent..... Fourthly, he must prove that he acted on that untrue representation, and that he has suffered damage." With regard to the meaning of the word "fraudulent" his Lordship said:—"If a man makes a statement knowing it to be untrue, and believing it not to be true, there is no

question that it is a fraud. If he makes a positive assertion without having any belief on the subject one way or the other, that is also fraud. But I think there are *dicta* which go to show that statements may be fraudulent which do not fall within any of these categories. Perhaps the law on that point is not quite settled yet. The difference of opinion may be very well illustrated by what was said by Lord Chelmsford, and by Lord Cranworth respectively in the well-known case of *Western Bank of Scotland* v. *Adie*.[1] ..... "I do not think it necessary for me upon this occasion to consider which of these views, if they do in fact conflict, is the more accurate ..... and I propose to deal with this case upon the footing that I have got to consider whether the directors, assuming that they made a misrepresentation, had any reasonable grounds for making the statement which they did." His Lordship then on the facts found that the directors thought that the Company with which they were connected, had the right to use steam, and further that they entertained that belief on reasonable grounds, and came to the conclusion that their action was not fraudulent in any sense which would render them liable for an action of deceit. On appeal Lord Justice Cotton stated the law with regard to an action for deceit, and the circumstances under which a defendant would be made liable, as follows:—"Where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing if to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed, and who was materially induced by the mis-statement to do an act to his prejudice." On the question as to whether in order to make a man liable in an action of deceit, which is grounded on fraud, it must be made out that the person making the statement was fraudulent in so making it, His Lordship after referring to *Edgington* v. *Fitzmaurice*,[2] and *Weir* v. *Bell*,[3] said: "I do not propose to enter into a discussion as to whether legal fraud is a happy expression, it is not one which I should adopt; but the question is, whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in those persons to whom the statements are made. In my opinion there is a duty. When a man makes statements which he desires that others should act upon, especially when they are in a prospectus ..... intended to be circulated among the public in order to induce them to take shares—in my opinion there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which, in fact, are false. to take care that he has reasonable ground for the material statements which

[1] L. R., 1 H. L Sch., 145, 161. [2] L. R., 29 Ch. D., 482 [3] L. R., 3 Ex. D., 238

are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others And although, in my opinion, it is not necessary that there should be what I call fraud, yet in these actions, according to my view of the law, there must be a departure from duty, and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth" On the facts his Lordship found that the statements in the prospectus were false; and that the directors had no reasonable ground for believing the statements to be true. On the question as to whether the plaintiff was induced by this statement to take shares, his Lordship held that it was not necessary that the mis-statement should be the motive, in the sense of the only motive, the only inducement to the party who has acted to his prejudice so to act. It is quite sufficient if the statement is a *material inducement* to the party to act upon it." Sir J Hannen expressed the law to be:—"If a man takes upon himself to assert a thing to be true, which he does not know to be true, and has no reasonable ground to believe it to be true in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit." And on the facts his Lordship held that the plaintiff had made out his case. Lord Justice Lopes expressed the principle of law governing this class of cases to be that, "if a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it, and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact and is made recklessly, for instance without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; fourthly, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief," and in applying those principles to the case his Lordship found in favour of the plaintiff. In the House of Lords,[1] the decision of the Court of Appeal was reversed, it being held that an action of deceit will not lie merely

[1] *Derry* v. *Peek*, L R, 14 App. Cas., 337.

for a false statement, carelessly made, but honestly believed to be true; and that there must be actual fraud Their Lordships adopting the first three definitions of fraud as given by Lopes J. in the Court of Appeal, but discarding the fourth This decision of the House of Lords has been followed in the case of *Glasier* v. *Rolls*[1] in which Lopes L J., reads the opinions of the learned Lords in *Derry* v. *Peek*, to be that the inaccuracy of a statement, however unreasonable, if honest and *bonâ fide*, will not support an action for deceit, because it does not contain the necessary element of dishonesty.

A director is not liable for fraud of a co-director or of any other agent of a Company unless he has authorized it —As a general rule one agent is not responsible for the acts of another agent unless he does something by which he makes himself a principal in the fraud[2] Thus a director of a Company is not liable for a fraud, such as the issue of a fraudulent prospectus of the Company committed by his co-directors, or by any other agent of the Company, unless he has either expressly authorized or tacitly permitted its commission Fry J, said "I conceive the general law to be this, that the persons responsible for a fraud are of two classes. First, the actual perpetrators of the fraud, the authors of it, the agents who commit it, the parties to it, those who concur in it, who either do something to produce the fraudulent result, or abstain from doing something, which they are under an obligation to the deceived person to do in order to prevent fraud Secondly, the principal for whom an agent in the performance of his duties as agent commits the fraud is also responsible. But as a general rule, I think that one agent is not responsible for the acts of another agent, unless he does something by which he makes himself a principal in the fraud"[3] But he will be held liable if whilst his information or knowledge is the same as that of his co-directors, he authorizes the issue of a prospectus, knowing that one giving the whole truth could not be issued, as in such case he cannot be heard to say that he has not taken part in issuing the prospectus[4]

Liability of agent for conversion —The agent is also liable to third persons for conversion, which is a pure tort, and may be defined as a wrong done by an unauthorized act which deprives another of his property permanently or for an indefinite time.[5] Actual dealing with another's goods as owner for however short a time, and however limited a purpose, is conversion;[6] and it makes no difference that such act is done under a mistaken but honest

[1] L R, 42 Ch D, 436.
[2] *Cargill* v *Bower*, L R, 10 Ch D, 502, (513)
[3] *Cargill* v. *Bower*, L. R, 10 Ch. D, 502.
[4] *Peek* v *Guerney*, L. R, 6 E & I App Cas, 378 Kerr on Frauds, 410
[5] *Per Bramwell B Hiort* v. *Bott*, L R., 9 Ex, 86, (89)
[6] *Hollins* v. *Fowler*, L R., 7 H. L., 757 Pollock on Torts, 290.

and even reasonable suspicion of being lawfully entitled,[1] or even with the intention of benefitting the true owner.[2] As to whether a mere ministerial dealing with goods at the request of an apparent owner who has control of them amounts to a conversion see *Hollins* v *Fowler*.[3]

Liability of innocent agent for conversion—Where the act of the agent in intermeddling with property is obviously wrongful, if the principal is not the true owner or has not his authority, the agent is not protected from liability, but if he is an innocent agent, he must look to his principal for indemnity, but where the act of an innocent agent is not obviously wrongful, if the principal is not the owner and has not his authority, there the agent is excused. Thus in *McEntire* v *Potter and Company*,[4] the defendants insurance brokers in London effected for one Grey, a shipowner in Dublin, insurance upon the hull and chartered freight of one of his ships, which ship was subsequently lost. Shortly after this loss Grey was adjudicated bankrupt, and the plaintiffs, who were his official assignees, became the assignees of his estate. After the adjudication Grey instructed the defendants to collect from the insurance office and to forward to him the insurance monies due upon the policies; this was done by the defendants in due course, they having had no notice that Grey had been adjudicated a bankrupt. The plaintiffs as assignees of Grey's estate sued the defendants to recover the money so paid over to Grey, Cave J., held that the defendants were liable, the plaintiffs' title having become complete upon adjudication. In the case of *Fowler* v. *Hollins*,[5] the plaintiffs sued the defendants who were cotton brokers to recover the value of 13 bales of cotton. The cotton was fraudulently bought by one Bayley from the plaintiffs' brokers; and the defendants without notice of any fraud bought in their own names, as principals, this cotton from Bayley, informing Bayley that they would disclose the names of their principals in the course of the day, which they did, the defendants subsequently sold it to Michols and Company, at the same price at which they had bought it, charging a commission. The defendants obtained a delivery order from Bayley, took delivery of the cotton and despatched it to Michols and Company who turned it into yarn. The defendants in buying the cotton were intending to act as brokers for Michols and Company. The plaintiffs sued the defendants for the price, the jury found that they had dealt with the goods as agents for principals, and Willes J., directed a verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them. A rule was obtained and was made absolute. On appeal the Judges were equally

[1] *Hollins* v *Fowler*, L. R., 7 H. L., 757. - Pollock on Torts, 290.
[2] *Per Bramwell B. Hiort* v *Bott*, L. R., 9 Ex., 86, (89).
[3] L. R., 7 H. L., at p. 766.
[4] L. R., 22 Q. B. D., 438.
[5] L. R., 7 Q. B., 616.

divided in opinion and the judgment of the Court below stood affirmed Martin Channell and Cleasby B B, affirming the judgment of the Court below, Kelly C B, Byles and Brett J J, dissenting The Court therefore held that the defendants were liable in trover for the price of the cotton Mr Justice Brett, was of opinion, that a broker. who acting only as such, negotiates a bargain of purchase and sale and passes a delivery order is not thereby guilty of a conversion so as to be liable in an action for trover, and that the asportation of the cotton from the wharehouse to the station of despatch being without reference or intention as to whose was the property in the cotton, was not a conversion Martin and Channell B B, considered that it was well settled that the assumption and exercise of dominion, (asportation being an exercise of dominion) over a chattel inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it was immaterial whether the act done was for the use of the defendant himself, or of a third person, and that any one who deals wrongfully with the goods of another is equally liable whether he be principal or agent Cleasly B, was of opinion that as the real principals were not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion. Kelly C B, and Byles J., considered the defendants were not guilty of conversion, inasmuch as they had acted only as brokers, and had exercised no dominion over the cotton in their own right and for their own benefit Kelly C B, on this point said; "It is true that a conversion has been correctly defined to be the exercising of dominion over property inconsistent with the title of the owner But justice, expediency, public policy and common sense have introduced exceptions or qualifications to this doctrine A carrier, who delivers a quantity of merchandise to one who claims and receives it as owner, a packer who packs and prepares for shipment and actually ships and consigns goods to one who receives and deals with them as his own, exercises dominion over them adversely to, and inconsistent with, the rights of the true owner Why then should not a broker, who interferes in the transfer of goods, not in his own right or on his own account, or claiming them as his own, but as the medium only between the vendor and purchaser, deriving no benefit from the transaction except his commission, be held equally within the exception which has been applied to carriers and packers? Considering the vast number and variety of the transactions effected, and the immense amount of property dealt with by brokers acting in the ordinary and accustomed course of business in London and Liverpool, and other great commercial towns, it seems most unreasonable and unjust that they should be bound to enquire into the titles of all the sellers of all the merchandises in respect of which they negociate contracts as brokers, or incur the risk of being compelled to make good the value to

some unknown owners, who have been improvident enough to part with them to a dishonest person in whom they have reposed a misplaced confidence. Then can it make any difference that the broker, acting under a *del credere* commission, or otherwise, as by contracting for an unnamed principal, makes himself personally liable? I think not, and that he must be still treated as an agent only ..... on the ground that the defendants here have acted as brokers and brokers only, and have exercised no dominion over these goods in their own right and for their own benefit, I am of opinion that they are not guilty of a conversion." The case went up to the House of Lords[1] where the judgment of the Queens Bench was affirmed. The question, however, referred to by Chief Baron Kelly as to the defendants being brokers, and for that reason being not guilty of conversion, was not decided, as their Lordships considered that the finding of the jury "that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they had dealt with it only as agents to their principals" should be explained, as the facts of the case shewed that the defendants had at the time of the purchase no instructions from principals to make a purchase, but made it believing that it would be acceptable to persons for whom they often acted as brokers, but who were not bound to adopt the purchase, and who, if there arose any difference as to terms, could not have insisted on the purchase, and therefore that they, although ordinarily acting as brokers, had made themselves liable to be treated as principals and to answer in trover to the real owners of the goods.

Appropriation where there is a dispute.—An agent has been held liable for conversion, who received into his godowns certain goods belonging to the plaintiff in charge of his the plaintiff's servant, concerning which there was a dispute between the plaintiff's agent and one B, of which circumstance the agent receiving the goods was aware, and he having advanced money to B on the security of such goods, subsequently received back the advance and delivered the goods to B who sold and delivered them to a purchaser with the knowledge of Kelly, notwithstanding the objection of the plaintiff's servant.[2]

Measure of damages for conversion.—The measure of damages in cases of conversion is in most cases the full value of the goods of which the plaintiff has been deprived; or the return of the goods themselves, and, possibly, damages for the loss of ownership in the meantime. On this point the case of the *Bombay Burmah Trading Company* v. *Mirza Mahomed Ally*,[3] may be cited; there the plaintiff had obtained from the Burmese Government a right to fell trees in the Ningyan forest, and to take the timber by river

[1] L. R., 7 H. L., 757

[2] *Anunt Dass* v *Kelly*, 1 N. W. P., Pt. VII, 107, ed. 1873, 194

[3] I. L. R. 4 Calc., 116. See also on the measure of damages *Hasam Kasam* v. *Goma Jadavji*, 5 Bom. H. C. (O., C.) 140

to Rangoon; at a subsequent date two other persons, agents of the defendants, obtained a concurrent right to fell and export timber, and shortly after that, obtained a monopoly for four years to export timber from the Ningyan forest; this grant was, however, not to come into operation until four months after it was granted: The plaintiff alleged that between the date of the grant and the time when it came into operation, he had a large quantity of logs felled, which he would have been able to have exported to Rangoon before the expiry of the 4 months, but that he was forcibly prevented by the defendants' agents from so doing; and subsequently he discovered a number of the logs marked with his mark at an intermediate station between the forest and Rangoon in the possession of the defendants' agents; the Recorder of Rangoon gave the plaintiff a decree giving as damages the full value of each of the logs as at the sale price at Rangoon. Their Lordships of the Privy Council however held that the claim was for a conversion of the timber at the intermediate station, and that although it might be right to take the value of the logs at Rangoon, which was the principal if not the only market for them, as the basis of calculation, yet from the price at which the plaintiff could have sold them, there must be deducted what it would have cost him to bring them to the market, which principle of estimating the damage was in accordance with *Morgan* v. *Powell*.[1]

Ordinary and special damage.—The principle as to damages ordinarily applied to an action of tort is that the plaintiff is never precluded from recovering ordinary damages by reason of his failing to prove the special damage he has laid, unless the special damage is the gist of the action.[2]

Liability of joint tort feasors in trespass.—A tort may be the result of concerted action on the part of several, and where there has been this concerted action the participators in the injury are called joint tort feasors. The liability in respect of it is said to be joint and several, and the plaintiff is entitled to recover damages from any or all of them.[3] Thus where one Rani Shamasundari Debi had obtained a decree for khas possession of a share in a certain zemindari and refused to recognize the ryots whom the farmers under her co-sharers had settled on the estate; and the Rani's servants cut and carried the crops on the lands cultivated by these ryots; in an action brought by the ryots aganist the Rani and her servants for damages, the lower Court held both the Rani and her servants to be liable, the servants being the actual perpetrators doing the act in furtherance of her known wishes and for her benefit. On appeal by the Rani only, Glover J., held that the Rani was liable for the acts of her servant which were done in furtherance of her known wishes and for her benefit, whilst Loch J., held that the cutting and carrying was beyond the

[1] L. R., 3 Q. B., 278.

[2] *Mohun Doss* v. *Gokul Doss*, 5 W. R. P. C., 91.

[3] Piggott on Torts, p. 47.

ordinary scope of the servant's duty, and that unless it could be shewn that the Rani ordered or ratified those acts, she was not liable, but considered that the circumstances of the case gave rise to a strong presumption that the acts were done with her knowledge, which was not rebutted, and therefore that the Rani was rightly held to have been liable with her servants.[1]

Liability of public agent, an officer, for wrongful act.—The liability of a public agent to third parties in tort, appears to be the same as that of any other agent; that is to say, he will be liable when acting outside the scope of his employment. In the case of *Abdoola bin Shaik Ally v. Stephens*,[2] a public officer, the Senior Naval Officer at Aden, and a lieutenant in the Indian Marine Service were held liable for the burning of a ship. The facts of the case were as follows:—The "Futteh Rahoman" owned by the plaintiff, a merchant of Muscat, left Bombay with a valuable cargo bound for Aden and Jeddah. When nearing Aden she ran on a sandbank, and was in $2\frac{1}{2}$ fathoms of water, but sustained no damage from the accident. The "Lady Canning" a steamer belonging to the Indian Navy, arrived on the scene under the charge of Lieutenant Peevor; Lieutenant Peevor, sent a midshipman named Armstrong with instructions how to act; Armstrong transferred the crew of the stranded vessel to the Lady Canning, and informed the crew, that it was his intention to burn the ship, they, however, remonstrated, but no attention was paid to them and the ship was burnt to the water's edge. All this was done in pursuance of instructions from Captain Stevens who was then the Senior Naval Officer at Aden, and who had seen the signal of the ship in distress, and had therefore directed Lieutenant Peevor, to proceed to her assistance, with the following written instructions: "On receipt of this if it is practicable in the present state of your engines, you will proceed, with all despatch along shore, to the eastward to render assistance to ..... a ship in distress. You will in all emergencies act as your discretion and judgment direct. ... You of course will have the entire direction of affairs, as you alone are responsible." At the same time Captain Stevens sent the following demi-official letter to Lieutenant Peevor. "My dear Peevor,—Watson will go with you, he will tell you all he knows. As the vessel may be plundered, your object will be first to get all the crew safe, their property (private) and their cargo. Be cautious in embroiling yourself with the Arabs. You might anchor close enough to cover the wreck with your guns till troops arrive from Aden along shore: thus a good deal of property and cargo might be saved and the ship got off. After getting all you can, I should think that the wreck ought to be burnt; but all is left to your discretion and

[1] *Rani Shamasundari Dabi* v *Dukhu Mandal*, 2 B L R (A C. J.), 228.

[2] 2 Ind. Jur.O. S., 17.

judgment. ....." The ship was burnt to the water's edge, and the wreck and cargo were sold by the assistant Political Resident at Aden, realizing Rs. 18,300. Captain Stevens approved of the acts of his subordinate Peevor, and he wrote a letter to Captain Playfair in which he referred to the burning of the ship, and in which he said, "of which measure I entirely approve." The act resulted in great loss to the plaintiff, and was wholly unjustifiable. Commodore Wellesley, the Commander-in-Chief of the Indian Navy wrote a minute in which he stated, "I am of opinion that, putting aside the question of whether the setting fire to the vessel was justifiable, the responsibility for its having been done (burnt) rests entirely upon Captain Stevens and not upon Lieutenant Peevor and those under his orders The demi-official note of Captain Stevens, the Senior Naval Officer to Lieutenant Peevor, which must be considered in the light of an official document, pointed out in detail the steps which it would be desirable to pursue." The Government passed a resolution on the subject, which contained amongst other matters, the following sentence "all Commodore Wellesley's observations appear just." The plaintiff sued Captain Stevens and Lieutenant Peevor claiming Rs. 25,000 as damages. Arnould J., on these facts held that the captain by the expressions used in the demi-official letter had rendered himself liable as principal and that his Lieutenant as the agent directly concerned in causing the burning of the ship was also liable to the owners for the damage occasioned. I have not, however, been able to obtain the full report of this judgment, and whether the Senior Naval Officer is said to have been liable (otherwise than by adopting the act of the Lieutenant) is not clear, it would however seem that in accordance with the English law,[1] he would not have been liable unless he had the power of appointing the Lieutenant as his officer, and it is probable that he had this power, as he appears to have been head of his department and not merely the Captain of the vessel. Where "public officers" are sued in tort they are entitled to notice of suit under s. 424 of the Civil Procedure Code.[2]

Liability of Judicial officers.—It is a principle of law, which has been introduced into this country by Statute, that no action will lie against a judicial officer; this rule is one in which the public are deeply interested, and which indeed exists for their benefit, and was established in order to secure the independence of such officers, and prevent their being harassed by vexatious actions.[3] This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free

[1] *Nicholson* v. *Mouncey*, 15 East, 384.

[2] *Shahebzada Shahunshah Begum* v. *Fergusson*, I. L R, 7 Calc., 499.

[3] See *Fray* v. *Blackburn*, 3 B. & S., 576

in thought and independent in judgment, as all who are to administer justice ought to be.[1] Under 21 Geo. III, c. 70, s. 24, it was considered reasonable to render Provincial Magistrates, Native and British subjects, more safe in the execution of their office, and it was therefore enacted that no action for wrong or injury shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country Courts, for any judgment, decree or order of the said Court, nor against any person for any act done by or by virtue of the order of the said Court. But in case of an Information intended to be brought or moved for against any such officer or magistrate for any corrupt act, no rule or other process should be made or issued thereon until notice be given to the officer or magistrate, or left at his usual place of abode, in writing, signed by the party or his attorney. Such notice to be one of one month when the person exercising such office resided within fifty miles of Calcutta, and of two and three months respectively, where such officer resided beyond fifty and one hundred miles from Calcutta respectively. Under 37 Geo. III, c. 142, s. 14, (an Act for the better administration of Justice at Calcutta, Madras and Bombay, &c.), no action for wrong or injury shall be brought against any person whatsoever exercising a judicial office in any country Court, for any judgment, decree, or order of the said Court, or against any person for any act done by or in virtue of the order of the said Court; and in case any Information is intended to be brought against any such person or officer, the same shall be brought and proceeded in, in the same manner, and to all intents and purposes in the same form, and to the same effect, as such Informations are directed to be proceeded in before the Supreme Court of Judicature at Calcutta in Bengal by an Act passed in the twenty-first year of the reign of George III, c. 70, s. 25. And in the year 1850, the Government of India by Act XVIII of that year (an Act, providing for the protection of judicial officers) enacted that no Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him in the discharge of his judicial duty, *whether or not within the limits of his jurisdiction*, provided that he at the time the act was done, in good faith,[2] believed himself to have jurisdiction to do or order the act complained of, and further that no officer of any Court, or other person, bound to execute the lawful warrants or orders of such persons above-mentioned acting judicially, should be liable to be sued in any Civil Court for

[1] *Garnett* v. *Ferrand*, 6 B. & C., (625), *per* Lord Tenterden.

[2] In England a Judge of a Court of record is answerable for an act done by his command when he has no jurisdiction, and is not misinformed as to the facts on which jurisdiction depends. See *Houlden* v *Smith*, 14 Q B, 841. See also *Lowther* v. *Radnor*, 3 East, 113.

the execution of any warrant or order which he would be bound to execute, if within the jurisdiction of the person issuing the same. And under Bengal Act, VII of 1880, s. 23, every Collector, Deputy Collector, Assistant Commissioner and Extra Assistant Commissioner, and every such officer as is mentioned in section 9 of that Act, acting in discharge of his duties under that Act is deemed to be a person acting judicially within the meaning of Act XVIII of 1850 It is to be assumed that a Coroner is a judicial officer, the eighth section of the Coroners Act, (Act IV of 1871) declares that inquiries held by that officer are judicial proceedings, but such declaration is stated to be for the purposes and within the meaning of s. 193 of the Indian Penal Code. In England the Coroner's Court has been held to be a Court of Record and no action will lie against a Coroner for turning a person out of a room where he is about to take an inquisition.[1]

But a Commanding Officer in Cantonments who under Act XXII of 1864, had control and direction of the police in the Cantonments has been held not to be a judicial officer, and not to have acted judicially in causing the arrest and examination of a person whom he *bonâ fide* believed to be dangerous by reason of insanity, and not to be protected under Act XVIII of 1850, for so proceeding.[2] The latest case on this subject is that of *Tyen* v. *Ram Lal*,[3] in which most of the authorities on the subject are referred to; there, the plaintiff brought a suit against a Magistrate of the first class to recover damages for the sale by the defendant of certain beasts the property of the plaintiff on the allegation that the defendant had in bad faith and maliciously, and without any sufficient cause, illegally, and without authority, sold the property in question before the date fixed for the sale, in execution of a sentence that subsequently on appeal was set aside. The Magistrate pleaded that the sale was held under s. 386 of the Criminal Procedure Code, and that to save the expense of maintenance the sale was held before the date fixed; and that he was protected under Act XVIII of 1850. It was found in the lower Court that the Magistrate had not believed in good faith that he had jurisdiction to sell as he had done, and that he had not used due care and attention in the matter. The High Court held that the legislature in passing Act XVIII of 1850, had presumably had in mind the decision of *Calder* v. *Halket*,[4] and intentionally used the word "jurisdiction" in the sense in which it had there been used by the Privy Council; for as their Lordships of the High Court said:—"if the term jurisdiction in the concluding paragraph (of the Act) were to be construed as meaning authority or power to issue the warrant in the particular matter and in the particular manner or form in which it was issued, the

[1] See *Garnett* v *Ferrand*, 6 B & C, 611.

[2] *Sinclair* v. *Broughton*, I L. R, 9 Calc, 341.

[3] Case decided by Edge C. J., and Tyrrell J, (unrep.) see *Pioneer*, 3rd Feb., 1890.

[4] 2 Moo. I. A., 292.

officer or person executing the warrant would under the section obtain no greater protection than the law without the aid of Act XVIII of 1850, already afforded him. ..... The protection to such officer or person afforded by that section was not against suits for executing lawful warrants or orders, but against suits for executing warrants or orders which were not lawful, provided that such warrant or order was issued by a judicial officer in a matter within his jurisdiction, and not merely in a matter in which such judicial officer had authority or power to issue the particular warrant." And in the result their Lordships were of opinion that the defendant was in doing or ordering the act complained of to be done, acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; that under such circumstances the finding of fact that he did not in good faith believe himself to have jurisdiction to sell the plaintiff's property in the manner he did, was immaterial; and that the fact that he acted with gross and culpable irregularity did not deprive him of the protection afforded by Act XVIII of 1850.

LECTURE XII.

LIABILITY OF PRINCIPAL TO THIRD PARTIES. PART I. LIABILITY IN CONTRACT.

Liability of principal to third parties in contract, general rule—Where principal is disclosed—Where undisclosed he is liable when discovered—Exception—As to whether principal when undisclosed is liable on negotiable instruments—Election by third party to sue either principal or agent—Election must be made within a reasonable time—What is evidence of election—As to what constitutes a binding election—Liability where the principal is a merchant residing abroad—Principal's liability for apparent authority of agent—Principal's liability to have a claim of set-off made against him—Liability when he employs an agent who cannot read—Liability of principal for mistakes of telegraph clerk—Where the contract by agent is one of a different nature to that he is employed to make—Liability of Stewards for acts of general managers—Liability of masters of ships in contract—Liability of Secretary of State in contract—Liability of principal for acts of sub-agent—Liability of principal for agent's admissions—Principle on which such admissions are binding—The admission must have reference to the subject matter of the agency—Admissions by pleaders—By partners—By a wife—Declarations of deceased agent when admissible—Liability of principal by reason of notice given to the agent—Actual notice—Constructive notice—Notice when effected as between principal and third parties—Whether the knowledge must be material to the business transacted—Whether employment of a person by an agent to do a ministerial act constitutes that person an agent so as to affect the principal with notice of his knowledge—Exception to the general rule as to notice—Effect on purchaser of carelessness in obtaining information—Notice in insurance cases, how far an assured is affected by information acquired by agent who is not the agent through whom the policy is effected—Doctrine of notice ought not to be extended

The liability of the principal to third parties arises out of the acts, contracts, and misconduct of his agent in the business of the agency transacted with such third parties. He is, therefore, made liable for whatever the agent does or says, whatever contracts, representations, or admissions he makes, whatever negligence he is guilty of, and whatever fraud or wrong he commits, provided the agent acts within the scope of his apparent authority, and provided a liability would attach to the principal if he was in the place of the agent.[1] And the extent of the agent's apparent authority in such cases, is, usually as between principal and third parties, to be measured by the extent of the agent's usual employment. First, as to the principal's liability in contract.

Where the principal is disclosed.—Where the name of the principal is disclosed by the agent, the principal will be liable to third parties, if the agent

[1] *Evans on Pr. and Ag.*, p. 516.

has acted within the scope of his real or apparent authority, and has otherwise lawfully contracted with such third party on his principal's behalf [1] Thus where a manib gomasta having complete control of an aratdari business borrowed money on behalf and in the name of his principal for the purposes of the business, it was held that the borrowing being an ordinary incident of the business, the principal was liable in a suit brought against the principal by the lender of the money [2] But if the agent has not acted within the scope of his authority or apparent authority in the business of the agency, and the act done by the agent is one which is unnecessary for the principal's business, the principal will not be held liable [3] Thus where the managing agents of the Baree Tea Company had a general banking account with the Oriental Bank, which account they were allowed to overdraw on having the overdraft properly secured And under the articles of Association of the Company the managing agents Messrs Nichols and Company had power to draw, accept, endorse and negotiate on behalf of the Company all notes, drafts &c as should be necessary for enabling them to carry on the business of the Company, and Nichols and Company purporting to act under this power drew a bill on the managing agents of the Company, which was accepted by the Company, and endorsed by Nichols and Company to the Oriental Bank who credited the amount to Nichols and Company's general account; and this amount was drawn out by cheques drawn by Nichols and Company personally, without reference to the Baree Tea Company, and there was no proof that the money had been expended for the purposes of the Baree Tea Company, the Court held in a suit by the Bank against the Baree Tea Company that the latter were not liable on the bills as acceptors. Garth C J, said:—"The question appears to be one of fact. Was the bill drawn and accepted for the purposes of the Company? or can we say upon the evidence that it was necessary for carrying on the business of the defendants Company that the bill should have been negotiated? . .. It has not been shewn that any of these sums were required for or expended upon the defendants' Tea Garden, or were otherwise used for the purpose of the defendant Company ..... even if the Rs. 15,000, (the amount of the bill in question) had been paid into the hands of Nichols and Company instead of being applied by the plaintiffs in discharge of Nichols and Company's private debt to them, I much doubt whether the defendants would be liable to pay the amount of the bills, unless it could be shown, which it certainly has not in this suit, that the money was really required for the purposes of the defendant Company.[4]

[1] Ind. Contr Act, ss. 230, 233. *Roghoobardyal Mundur* v. *Christian*, 3 W. R., 123

[2] *Denobundhoo Shaw* v. *Kully Doss Roy*, (unrep.), App. No 23 of 1887, decided by Pethram C J, Wilson and Tottenham JJ, on the 24th November, 1887.

[3] See post p. 421 "Liability to third persons for apparent authority of the agent." *Mackenzie, Lyall* v. *Moses*, 22 W. R, 156.

[4] *Oriental Bank Corporation* v. *Baree Tea Co*, I L R, 9 Calc., 880

And further the contract made by the agent for his principal, in order to bind the latter to third parties, must be one which the principal is not entitled to repudiate.[1]

Where the principal is undisclosed he is liable when discovered — Although as has been pointed out in the lecture on the Liability of the Agent to third parties, the agent is presumed to have contracted personally when not disclosing his principal, and is in such cases *primâ facie* liable on the contract;[2] yet inasmuch as the contract entered into by the agent is in reality that of the principal, it having been made at his command, the principal will, at the option of the third person, when discovered, be liable to be sued on the contract.[3] A test of whether a person answers to the definition of an undisclosed principal, and can be sued as such will be found in the case of *United Kingdom Mutual Steam Ship Company Assurance Association* v. *Nevill*.[4]

Exception to the rule —This rule that an undisclosed principal when discovered is liable to be sued at the election of the third person if such election is made, as will be seen hereafter, within a reasonable time, is subject to this qualification, *viz.*, that he will not be held liable if such third person has induced the principal to act upon the belief that the agent only would be held liable.[5] This is made clear by the decision of Mr Justice Marriot in *Premji Trikandas* v *Madhowji Munji*,[6] there the defendant was a merchant residing in Dholera whose agents in Bombay were Moti Ganesh and Narranji Kessawji, the latter of whom carried on business at Bombay under the name of Sunderji Kessowij, Moti Ganesh being a servant of the defendants who used to purchase for the defendant under directions from Sunderi Kessowji A running account was kept between the defendant and his agents, in which the former was debited with the price of goods purchased on his account, by the agents, and was credited with the price of goods sold by the agents on his account, and with the amount of remittances which he sent to the agents from time to time. In fulfilment of orders received from the defendant in March 1879, the agents bought from the plaintiff during the month of March, three lots of cocoanuts, *viz.*, 20,000, 10,160, and 26,626 at certain rates, the purchase-money to be paid on delivery. At the time of making the three sales, the plaintiff did not know and had no reason to suspect that Sunderi Kessowji was purchasing as agent, but considered him to be the principal in the transaction. The two first lots of cocoanuts were trans-shipped from the plaintiff's boats to the "Laksmiprasad," and the third lot to the "Lalsary" for transport to Dholera. The "Lalsary"

[1] Ind. Contr. Act, s 215. See p. 309

[2] Ind Contr Act, s. 230, para. 2

[3] Ind. Contr. Act, s. 233. *Purmanandass Jivandass* v. *Cormack*, I. L R., 6 Bom., 324.

[4] L R., 19 Q. B. D., 110.

[5] Ind. Contr. Act, s. 234.

[6] *Premji Trikandas* v. *Madhowji Munji*, I. L. R , 4 Bom., 447

sailed from Bombay on the 31st March, and on arrival at Dholera the defendant obtained possession of the third lot of cocoanuts. On the 1st April Sundari Kessowji received from the defendant remittances sufficient to pay for all the cocoanuts and to leave a balance of Rs. 1,727 to the credit of his account. These remittances were made by the defendant in good faith, and were received by Sundari Kessowji at a time when the plaintiff gave credit to Sundari Kessowji and did not know of any one else to be charged with the price of the cocoanuts. On the 2nd April the firm of Sundari Kessowji stopped payment, and on the 3rd April the plaintiff, in consequence of this failure and the non-payment of the price of the cocoanuts, trans-shipped the cocoanuts from the "Lakhmiprasad" into the "Ramprasad." These cocoanuts were subsequently sold, and the proceeds of the sale deposited in the Bank of Bombay to abide the result of the suit. On the 4th April, the plaintiff discovered that the defendant was the principal in the transactions, and sued him to recover the price of the three lots. The defendant denied that Sundari Kessowji had authority to pledge his credit, and contended that, having in good faith paid the agents prior to the institution of suit he was not liable. Marriott J., held that the plaintiff was entitled to recover; and said:—"The plaintiff claims to recover (the price) from the defendant as the undisclosed principal in the transaction: but whether he is entitled to do so or not, depends upon the construction of ss 231, 232 and 234 of the Contract Act. ..... This section (231) provides with reference to the assertion of rights by and against the undisclosed principal,—(1) that the principal of the agent making the contract, may require performance of the contract from the other contracting party; and (2) that the other contracting party has, against the principal, the same rights as he would have had against the agent, if the agent had been the principal. Then comes section 232, ... the 'principal' in this section is the principal of the agent. The concluding sentence of the section makes any other construction impossible. The section so construed makes the right of the principal to require performance subject to the rights and obligations existing between the agent and the other contracting party, and thus qualifies the unlimited right of the principal, given by the 1st portion of s. 231. It was argued for the defendant, that s. 232 as so construed, became a nullity, and is but a repetition of s. 231, and that the proper mode to construe the section is to substitute the word "former" for principal, and that the section would then be consistent with the exception engrafted by English law on the personal liability of an undisclosed principal (*Thompson* v. *Davenport*,[1] and *Armstrong* v. *Stokes*),[2] *viz.*, that the right of the other contracting party to hold the principal liable, is subject to the qualification, that the principal has not *bonâ fide* paid the agent, or that the state of the accounts between the principal

[1] 2 Sm. L C, 7th Ed, 364.

[2] L. R. 7 Q. B., 598.

and agent has not been altered to the prejudice of the principal. To arrive at this desired construction not only should I have, as suggested, to substitute the word "former" for "principal," but it would also be necessary to alter the concluding sentence of the section, ... by substituting the word 'principal' for the words 'other party to the contract.' Moreover the illustration to the section would be inapplicable. ..... Section 234 imposes a further qualification upon the rights given to the other contracting party by the second portion of the first paragraph of section 231. It will be seen therefore, if my view of the construction of the section is correct, that the Indian Contract Act has by section 232 adopted, as regards the principal, the qualification imposed on him by English law, namely, that he must take the contract subject to all the equities, in the same way as if the agent were the real principal: but that, in the converse case of the other contracting party, *it has not imposed upon him the qualification laid down by the cases of Thompson* v. *Davenport and Armstrong* v. *Stokes, namely, that his (the other contracting party's) right to hold the principal liable, is subject to the qualification that the principal has not paid the agent, or that the state of the accounts between the principal and agent has not been altered to the prejudice of the principal.* The only qualification imposed on the assertion, by the other contracting party, of his right as against the principal, is that imposed by s. 234, namely, that he has not induced the principal to act upon the belief that the agent only will be held liable. This qualification is almost the language used by Parke B., in *Heald* v. *Kenworthy*,[1] in explanation of the language of Bayley J., in *Thompson* v. *Davenport*. Parke B., says:—"If for example the principal is induced by the conduct of the seller, to pay his own agent on the faith that the agent will settle with the seller, in such a case the seller would be precluded from recovering; as it would be unjust for him so to do. But under ordinary circumstances, the plaintiff in such case is entitled to recover, unless he has either deceived the defendant (there the principal) or induced him to alter his position."

It will not be out of place to refer more fully the case of *Heald* v. *Kenworthy*,[1] as it appears to be the case on which section 234 of the Indian Contract Act is based. The declaration in that case was for goods sold and delivered, to which the defendant pleaded that the purchase was made by one Taylor, the defendant's agent, and that the defendant, within a reasonable time after the sale, and not unduly early, *bonâ fide* paid to Taylor sufficient money to pay the plaintiff. The plea was subsequently amended so as to admit that a debt had been created between the plaintiffs and the defendant, but the amended plea is not set out in the report. Pollock C. B., said: "I am of opinion that the plea is bad. It comes shortly to this—a person employs his agent to purchase goods for him, with authority to pledge his credit.

[1] 24 L. J. Ex., 76.

The agent does so, and thus creates a debt; and I agree with the remark made by my Brother Parke, that all the cases in which the principal has been held to be discharged, are cases in which the seller has enabled the agent to misrepresent, or where the agent by some conduct adopted by the seller has placed his principal in a worse situation than that he ought to be in. This plea contains nothing of that sort. It merely states that the plaintiffs treated Taylor as the principal, and that the defendant *bonâ fide* settled with him." Parke B., said: "I am of the same opinion. The plea simply states that after the contract was entered into between the plaintiffs and a third party, the agent of the defendant, under circumstances which rendered the defendant liable upon it, the latter paid the agent; I am of opinion that this is no defence to this action. It is clear that if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly, But there are no doubt cases and *dicta* which, unless they be understood with some qualification, afford ground for the position taken by the Counsel for the defendant." His Lordship then quoted the *dictum* of Bayley J., in *Thompson* v. *Davenport*, *viz.*, 'that if the agent does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable if the justice of the case is, that he should not be personally liable. ..... If the principal has paid the agent, or if the state of accounts between the agent here and the principal would make it unjust, that the seller should call on the principal the fact of payment or such a state of accounts would be an answer to an action brought by the seller where he had looked to the responsibility of the agent," and proceeded:—"The expression 'make it unjust,' is very vague, but if rightly understood, what the learned Judge said, is. no doubt, true. If the conduct of the seller would make it unjust for him to call upon the buyer for the money; as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and the seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or contract, the seller cannot afterwards throw off the mask and sue the principal. It would be *unjust* for him to do so. But I think there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant, or to induce him to alter his position." To the same effect, in the same case, was the opinion of Alderson B., who said:—"But there must be some act on the part of the creditor to warrant us in saying that the payment by the debtor to his agent, is to be treated as a payment to the creditor."

With reference to the arguments based on *Armstrong* v. *Stokes*,[1] used by the

[1] L. R., 7 Q. B., 598

defendant's Counsel in the Bombay case before Mr. Justice Marriott, I may here remark, that although *Armstrong* v. *Stokes* does not appear to be law in India, that case has been to a great extent disapproved of in *Irvine* v. *Watson*,[1] which was a case in which the vendor knew that the person with whom he was dealing had a principal behind, although he did not know who that principal was Brett L. J., in that case said: "If the authorities stood there" (*i. e.*, previous to the decision of *Armstrong* v *Stokes*) "I should have no doubt that the limitation put by Parke B, (in *Heald* v. *Kenworthy*) on the earlier wide qualification was correct But it is suggested that that limitation was overruled in *Armstrong* v. *Stokes*. I think, however, that the Court there did not intend to overrule it, but to treat the case before them, as one to which the limitation did not apply... If the case of *Armstrong* v *Stokes* arises again, we reserve to ourselves, sitting here, the right of reconsidering it" Baggallay L. J., also said:—"It is to be observed that they were mere *dicta*, (in *Thompson* v *Davenport*) and quite unnecessary to the decision. The largeness of those *dicta*, has since been dissented from by Parke B, in *Heald* v *Kenworthy*, and with his dissent, I entirely agree." It therefore appears, that the *dicta* of *Thompson* v. *Davenport*, *Smyth* v. *Anderson*, and the ruling in *Armstrong* v *Stokes* are no longer considered correct on this point, and that the rule laid down by Parke B, in *Heald* v *Kenworthy* prevails. In India the case of *Irvine* v *Watson*[1] would be in accordance with s. 234 of the Contract Act, as also as has been seen is the case of *Heald* v. *Kenworthy*, I therefore think that it is correct to say that the only qualification to the right of the vendor to hold an undisclosed principal liable, (whether in the case where the vendor at the time of the sale supposes the agent to be himself a principal and gives credit to him alone, and afterwards discover the principal, and also where the vendor knows that the person with whom he is dealing has a principal behind, although he does not know who that principal is) is that laid down by Baron Parke in *Heald* v *Kenworthy*, *viz*, that where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot then turn round and throw off the mask and sue the principal; or in other words, the only qualification is, that laid down by s 234 of the Contract Act as based upon *Heald* v *Kenworthy*. It may be remarked that in *Armstrong* v. *Stokes*,[2] it is said of *Heald* v. *Kenworthy*, "that the case arose on a demurrer to a plea, which plea as amended is not set out in the report, and therefore it is not easy to say what was the actual decision; that it does not appear that in any part of the plea set out that the plaintiff was

[1] L R, 5 Q B D., 414, in the Court below L. R, 5 Q. B D, 102.

[2] L R, 7 Q B., 598.

ignorant of the existence of the defendant as principal till after the defendant had paid the money, nor even that the defendant believed such to be the case. And that therefore the plea was not such as to raise the very point; that the opinions of the Court were but *dicta* entitled to high respect as an authority, but not binding as a decision." But having regard to the opinions given in *Irvine* v. *Watson*[1] in the Court of Appeal, and to the fact that in India the law is laid down for us in section 234 of the Contract Act, whether that is so or not, will not affect the law as administered in this country. Where the principal is induced to believe by the seller that exclusive credit is given by the seller to the agent, a settlement or payment made by the known or unknown principal to his agent before the due date of payment, may of course relieve the principal from responsibility to the seller.[2] But mere delay in enforcing payment from an agent will not be sufficient to discharge the principal from his liability; but in order to discharge him from a debt contracted by his agent, the principal must show that the creditor has himself mislead him into supposing that he has elected to give exclusive credit to the agent, and that the principal has been prejudiced by that supposition.[3] In the case last cited therefore the doctrine laid down in *Heald* v. *Kenworthy*,[4] and sanctioned by the Court in *Irvine* v. *Watson*,[1] has been clearly followed.

As to the principal's liability on negotiable instruments where his name is not disclosed.—A question may arise as to whether the rule in force in England as to negotiable instruments, namely, that nobody is liable upon a bill of exchange or promissory note unless his name, or the name of some partnership or body of persons of which he is one appears either on the face or the back of the instrument, holds good in India (although this rule appears to be no longer law as far as acceptances of bills by agents of Companies are concerned since the case of *Ukell* v. *Charles*,)[5] having regard to sections 27 and 28 of the Negotiable Instruments Act and s. 233 of the Contract Act. The rule above stated is founded on the Law Merchant; and is referred to by Lord Abinger in *Beckham* v. *Drake*[6] as follows :—"The right to sue the principal when disclosed does not apply to bills of exchange accepted or endorsed by the agent in his own name; for by the Law Merchant a chose in action is passed by endorsement, and each party who receives the bill is making a contract with the parties upon the face of it and with no other party whatever." This rule is also referred to in *Lindus* v. *Bradwell*,[7] *Thomas* v. *Bishop*,[8] *Nicholls* v. *Diamond*,[9] *Leadbitter* v. *Farrow*,[10] *In re Adansonia Fibre Company, Miles's claim*,[11] and *Byles on*

[1] L. R., 5 Q. B. D., 414.
[2] *Irvine* v. *Watson*, L. R., 5 Q. B. D, 102, (107).
[3] *Davidson* v. *Donaldson*, L. R., 9 Q. B. D, 623.
[4] 10 Ex., 739.
[5] 34 L T., 822.
[6] 9 M. & W., 92.
[7] 5 C. B., 583; 17 L. J. C. P., 171.
[8] 2 Str, 955
[9] 23 L. J. Ex., 1.
[10] 5 M. & S., 349.
[11] L. R., 9 Ch., 635.

Bills (14th ed., p. 44, 13th ed., p. 38), *Dutton* v. *Marsh*,[1] *Alexander* v. *Sizer*.[2] The question appears to be, is section 233 of the Contract Act applicable to the case of negotiable instruments? From certain remarks made on page 1 of the Introductory Chapter to Cunningham and Shepherd's Contract Act, it appears that certain special subsidiary chapters of the law of contract, amongst which is mentioned the law regulating promissory notes and bills of exchange, are said to have been intentionally omitted from the Contract Act. However in a report[3] of a Select Committee on the Negotiable Instruments Act, the Commissioners say in paragraph 13, "We made s. 40, (which section now answers to s. 28 of the Act,) agree with the Contract Act by wording the exception thus:—"except to those who induced him to sign upon the belief that the principal only would be held liable;" this agreement, however, clearly only applies as to s. 234 of the Contract Act, and not to the whole Act. But again in para. 16, they say, "We have omitted s. 42, as the Indian Contract Act, 1872, will of its own force extend to all contracts evidenced by bills, notes and cheques." Also in para. 34, they say:—"We are well aware that the Bill does not deal exhaustively with the subject; but we believe that the Bill, the Contract Act (to which it is a supplement) and the Evidence Act will, taken together, supply rules sufficient for the disposal of the questions that ordinarily arise as to the rights of parties to negotiable instruments." These remarks appear to show that the Contract Act and the Negotiable Instruments Act together form the law on contracts evidenced by bills and notes. There do not appear to be many Indian cases on the subject. There is, however, the case of *Shee Churn Sahoo* v. *Curtis*,[4] decided in 1865, which appears to have been decided on the Law Merchant as reference is there made to Byles on Bills; in that case it was held that where an agent signs a note without disclosing his principal, the principal could not be made liable, and that no evidence was admissible to establish his liability. In the case of *Syud Ali* v. *Gopal Doss*,[5] it was held that the Law Merchant was not applicable to the Mofussil where custom is set up. In *Pigou* v. *Ram Kishen*,[6] there are certain *dicta*, (which are, however, referred to in *Hurree Mohun Bysack* v. *Krishore Mohun Bysack*,[7] as being distinctly *obiter*,) which at all events refer to the English rule of law as existent in India, and again there is the decision of *Bommee Chetty Ramiah* v. *Viswanada Pillay*,[8] which refers to the rule of English law, and

[1] L. R., 6 Q. B., 361.
[2] L. R., 4 Ex., 102.
[3] See Part V, p. 163 of the Gazette of India, dated 20th June, 1878.
[4] 3 W. R., 139.
[5] 13 W R., 420.
[6] 2 W R, 302.
[7] 17 W. R., 442.
[8] 6 Mad., Jur., 305.

infers, I think, that it is applicable to India. All these cases are, however, previous to the Contract Act. And lastly, there is the case of *In re the New Flemming Spinning and Weaving Company*,[1] a case of a Company, decided in 1879, in which *Beckham* v. *Drake*, and *in re Adansonia Fibre Company, Miles's claim*, are both considered and in which case the Court of appeal held that in order to make a Company liable on a bill or note it must appear on the face of it that it was intended to be drawn, accepted or made on behalf of the Company, and that no evidence *dehors* the bill or note was admissible under the companies Act to show on whose behalf the bill or note was made—and that case has been followed in *In re Nursey Spinning and Weaving Company*,[2] I would further point out that neither the Contract Act, nor the Negotiable Instruments Act are exhaustive, and that it may well be that the Law Merchant is not therefore interfered with. A somewhat analogous instance of the Common law liabilities of Common Carriers being held not to be touched by the Contract Act will be found in the cases of *Moothora Kant Shaw* v. *India General Steam Navigation Company*,[3] and *Moheshwar Das* v. *Carter*.[4] And lastly it must be remembered that negotiable paper circulates amongst the mercantile communities of the world as representing money, and it is therefore of importance that the character and liability of the parties to it shall appear with certainty upon the face of the paper itself. And if, as said Mr. Latham in the Bombay case, evidence were to be admitted of an undisclosed principal in the case of a bill or note, the value of the bill or note as a negotiable instrument would be destroyed; for they both go into the market on the credit of the name appearing on them. And if therefore evidence were to be admitted that some unknown person was really liable, an element of uncertainty would be introduced that would destroy their value. Further, a drawer of a bill is entitled to get notice of its dishonour, and without such notice he is discharged; but a holder of such bill may not know at the time that it was drawn by a Company, and so be unable to give notice.

Election.—Wherever, a vendor discovers that the person with whom he has contracted, is acting for a principal, he may hold either the principal or agent or both of them severally liable.[5] In such case either the principal or the agent may, when sued, contend that his liability to be sued was put an end to by the plaintiff's election to sue the other party.[6] Thus in *Purmanundass Jivandass* v. *Cormack*,[7] Purmanundass claimed to rank as a creditor of the New Flemming

[1] I. L. R., 3 Bom., 439: on appeal I. L. R., 4 Bom, 275, (278), (285).
[2] I. L. R., 5 Bom., 92.
[3] I. L. R., 10 Calc., 166.
[4] I. L. R., 10 Calc., 210.
[5] Ind. Contr. Act, s. 233.
[6] Evans on Principal and Agent, 528. *Gouree Sunkur* v. *Bholee Pershad*, 11 W. R., 247.
[7] I. L. R., 6 Bom., 326.

Spinning and Weaving Company Ld. in liquidation, in respect of a sum which he had lent to Nursey Kessowji, then the secretary, treasurer, and agent of four Mill Companies, amongst which was the New Flemming Spinning and Weaving Company; Purmanundass, being at that time unaware on behalf of what principal Nursey was acting; the money being advanced to him as an agent for an undisclosed principal. To secure this loan Nursey executed an agreement and deposited shares of the Company with Purmanundass; the father of Nursey further guaranteed in writing, the repayment of the above loan. Subsequently Nursey, without the knowledge of his father, extended the time for repayment of this loan. Nursey shortly afterwards became insolvent, and about the same time an application was made to wind up the Company. Purmanundass then made enquiries from the New Flemming Company if the sum he had lent appeared to his credit in their books, and was informed that this was so. Shortly after this Purmanundass through his attornies gave notice that he should sell the shares deposited with him as security, and, the Company being then in liquidation, claimed payment from the Company of the sums lent, filing his claim before the Official Liquidator. Purmanundass also sued the father of Nursey on his guarantee, but without success, the suit being dismissed on the ground that time had been given to Nursey without the knowledge of the guarantor. In the claim proceedings, it was contended by the Official Liquidator that the loan was to Nursey personally, and that credit had been given to him and to his guarantor and not to the Company; that Purmanundass having elected to give credit to the agent and not to the Company, knowing that the latter was the principal, was not entitled afterwards to turn round and charge the principal on the default of the agent. Mr. Justice Bayley found that Nursey had power from the Company to borrow, that he was personally liable under his express contract, but that having acted for an undisclosed principal, the claimant was at liberty on discovery of the principal to hold the Company or Nursey or both of them liable; that he had not at any time induced the directors of the New Flemming Company to act upon the belief that Nursey only would be held liable, but had asserted his claim against the Company with all his power; and with reference to this question of election said, "Purmanundass, directly he knew who the principals really were, elected to proceed against them, and in no way and at no time can he be said to have elected to proceed against Nursey. An election once validly made is final, and cannot be opened or altered, and a fresh election made." So again in *Calder* v. *Dobell*,[1] Mr. Justice Montague Smith says:—"The cases shew that the seller may make his election whenever the principal is discovered; and the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that in the former case the election may be made at the very time

[1] L. R., 6 C. P., 486, (497).

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the contract is made" This right of election is, however, subject to this, that if the third person has induced either the agent or the principal to act on the belief that the principal or agent will be held exclusively liable, he cannot then have a right to elect between them.[1]

Election must be made within a reasonable time.—Although the third person has a right to elect as to whom he will hold liable, yet he must make such election within a reasonable time after the discovery of the real principal. For as Mr Justice Hill says in *Smethurst* v. *Mitchell*,[2] "It is most important that the vendor, when he is made acquainted as to who is his principal, should make his election within a reasonable time. The language of the Judges in all the cases is, 'on discovering the principal thereupon the vendor has a right to charge the principal' ..... a vendor cannot hold his principal liable where there is any circumstance in the case which renders it not right or equitable that he should do so; for instance, by lying by, and by his conduct inducing the purchaser to change his position."

What is evidence of election.—The case of *Calder* v. *Dobell*,[3] to which Mr. Justice Bayley in the Bombay case refers, lays down some few points on the question of election which may be usefully referred to as showing what is evidence of election, there, a broker entered into a contract in his own name, although he had verbally disclosed to the vendors who his principal was: it was contended that the very fact of the plaintiffs (the vendors) entering into the contract with the broker, and the demand from him of payment were evidence of election Bovill C. J., said:—"Election must be a matter of fact; and it appears that at the time of entering into the contract, the plaintiffs expressly refused to trust Cherry (the broker). The next ground of alleged election was the demand of payment made on the broker. That, however, was an equivocal act. If the plaintiffs have got the responsibility of a principal, the demands made upon the agent may have been made upon him on behalf of his principal." Willes J., said:—It would be a very remarkable contract if the buyer could sue the sellers upon it, and yet the sellers be precluded from suing the buyers. The result is, that the defendant must show that his liability was put an end to by the election. That is what Lord Tenterden meant when he said in *Thompson* v. *Davenport*[4] that, 'if at the time of the sale the seller know not only that the person who is nominally dealing with him is not principal, but agent, and also know who the principal really is, and notwithstanding all that knowledge, choses to make the agent his debtor, dealing with him alone, then, according to *Addison* v. *Gandaseque*,[5] and *Paterson* v. *Gandaseque*,[6] the seller cannot afterwards, on the failure of the agent, turn round and charge

[1] Ind Contr. Act, s. 234.
[2] 5 Jur, N S., 978; 1 El. & El., 622.
[3] L. R., 6 C. P., 486.
[4] 9 B & C, 98.
[5] 4 Taunt., 574
[6] 15 East, 62.

the principal, having once made his election at the time when he had the power of choosing between the one and the other.' I do not agree with Mr. Holkar that two persons cannot be severally liable upon the same contract. The question is, whether there was anything in the circumstances of this case to negative or exclude the liability of both principal and agent, or to substitute the liability of the latter for that of the former." Montague Smith J., said: – "I agree that it" (the entering "into the contract with Cherry in his own name) was strong evidence" (that the plaintiffs had elected to treat Cherry alone as the principal;) "but if the parol evidence (to charge the principal) was admissible, it shews what the real transaction between the parties was ..... Mr. Holkar contended, that the election was made and conclusively made at the time of the contract. The cases show that the seller may make his election whenever the principal is discovered; and that the only difference in principle between the case where the principal is disclosed and where he is not disclosed, is, that, in the former case, the election may be made at the very time the contract is made."

As to what constitutes a conclusive election.—Whether in regard to proceedings taken against the agent anything short of judgment and satisfaction would be sufficient to exclude resort to the principal is the point raised in *Priestly* v. *Fernie*,[1] a case also referred to in the Bombay case of *Purmanunduss Jivandass* v. *Cormack*. There, an action had been brought in the Supreme Court of Melbourne against the captain of a ship for the non-delivery of goods pursuant to a bill of lading, in which the plaintiff recovered judgment. A fresh judgment was obtained in the Court of Exchequer at Westminster, and upon the judgment which was then recovered against the defendant (the captain) a *ca sa* was issued, upon which the captain was arrested and detained until he was subsequently made a bankrupt. An action was then brought by the same plaintiff for the same breach upon the bill of lading against the shipowner (the principal), to which was set up, by way of defence, the previous proceedings against the captain, which were relied on as a conclusive election in point of law to hold the captain alone responsible and discharge the shipowner. It was argued on behalf of the plaintiff in that case, that generally resort might be had to the principal unless the agent had been so dealt with as to render such a course unjust, and that so far as legal proceedings against the agent were concerned, nothing short of satisfaction as well as recovery of judgment would have that effect, and it was pointed out that the discharge of the captain by force of the bankrupt law, and without the plaintiff's consent, did not amount to satisfaction. Bramwell B., held, that where an agent who has made a contract in his own name has been sued on it to judgment, even without satisfaction, no second action would be maintainable

[1] 3 H & C., 977.

against the principal. But Quain J., in delivering judgment in *Curtis* v. *Williamson*[1] says with regard to the judgment of Bramwell B., in *Priestly* v. *Fernie*, "It is clear from the language used by Bramwell B., that whilst it was considered that judgment against the agent, even without satisfaction, would constitute a conclusive election, yet that no legal proceedings short of judgment would have that effect, for he distinctly points out that by the word 'sue' he means 'sue to judgment.' If the facts in the present case were similar to these in *Priestly* v. *Fernie*, we should, of course, be bound by the decision in that case to hold that "suing" the principal in the sense in which the word "sue" is there used, would, though the claim remained unsatisfied, amount to a binding election." The mere fact of filing an affidavit of proof against the estate of an insolvent agent to an undiscovered principal, after that undiscovered principal is known to the creditor, is not conclusive election by the creditor to treat the agent as his debtor; although it might possibly, in an appropriate case, constitute with other facts some evidence of election to be submitted to the jury.[2] And it is clear that the election must be made within a reasonable time after the vendor has discovered the principal; and nine months has been considered not to be within the limits of such reasonable time.[3] Doubts, however, have been expressed by the learned Judges of the Madras Court, in *Head* v. *P. M. Mutukarappen Chetty*,[4] how far the doctrine of *Priestly* v. *Fernie*[5] ought to be applied to this country, or if applied whether, to a case of election by suit in a foreign country and the obtaining of a judgment there which has no fruits; I think, however, that as the Madras and Bombay Courts in the cases about to be referred to, have, since 1871 the date of the decision referred to, referred to the case of *Priestly* v. *Fernie* and drawn deductions therefrom in the judgments delivered, it may be taken that the doubt expressed no longer exists. In the Bombay case referred to[6] it was, as before stated, sought to show that Purmanundass had elected to treat Nursey Kessowji as his debtor, for whom one Kessowji Naik had stood security; no action was ever there taken against the agent Nursey Kessowji, but Purmanundass sued Kessowji Naik, but did not obtain judgment against him as the suit was dismissed with costs; it was there said by Mr. Justice Bayley;—"No case has been cited, nor I believe does any exist, which shows that suing a person, who has guaranteed a loan, or the price of goods sold to an agent, and, moreover, suing him without success is a binding election to deal with the agent as alone

[1] L. R., 10 Q. B., (60).

[2] *Curtis* v. *Williamson*, L. R., 10 Q. B, 57.

[3] *Smethhurst* v *Mitchell*, 1 El. & El., 622.

[4] 6 Mad. Jur., 217.

[5] 3 H. & C., 977.

[6] *Purmanundass* v *Jivandass* v. *Cormack*, I. L. R, 6 Bom, 326. See also *Devrav Krishna Halambhai*, I. L. R., 1 Bom, 87.

liable, and abandon all right to take proceedings against his principals Here the election to go against the Company and to charge them as principals had been duly and finally made long before proceedings were commenced against Kessowji Naik." And in the Madras case of *Ramam* v. *Vairaram*,[1] where a creditor sued an agent of his debtor, alleging that the agent had made himself liable for the debt, and the suit was dismissed on the ground that the creditor gave credit to the principal, and the creditor then sued the principal for the same debt, it was contended that the suit against the agent was conclusive evidence of an election to give credit to the agent; and for this position *Priestly* v. *Fernie*, was relied on; the Court held that the principle transit in *rem judicatam* did not apply, as there was no judgment against the agent on the debt.

When the principal is a merchant residing abroad.—In such case practically the same principles apply as are applicable to the liability of undisclosed principals—and in fact in all cases in which the presumption is, that the agent has contracted personally,[2] the third person with whom he has contracted may hold the principal also liable.[3] It is, however, not apparent how this rule is to be applied to the third clause of the second paragraph of Section 230 of the Contract Act, namely, in the case where the principal, though disclosed, cannot be sued.

Liability to third person for the apparent authority of the agent.—Again if the principal by words or conduct has induced third persons to believe that acts or obligations done or incurred by his agent without authority, were in reality done and incurred within the scope of his authority, in such case he will be bound by the acts of his agent, and will be liable therefor;[4] for third parties cannot be affected by any private arrangement between the principal and the agent. And as has been mentioned in the lecture on the "Nature and Extent of the Authority," the apparent authority is in such cases to be taken to be the real authority. In considering this liability, care must be taken to note that the Contract Act makes no distinction between acts done by an agent acting under a general authority, and one having merely a special authority, for where a man deals with an agent knowing that he is an agent, he is bound to inquire as to the extent of the agency, and if he does not do so, he must be taken to know the limits of the agent's authority.[5] Thus where a European firm employed an agent to make purchases of jute in the bazar, upon orders

[1] I. L. R., 7 Mad., 392.

[2] Ind Contr. Act, s 230, para. 2.

[3] Ind. Contr. Act, s. 233.

[4] Ind. Contr Act, s. 237. *Edmunds* v. *Bushell*, L R, 1 Q B, 97 *Summers* v *Solomon* 26 L. J. Q. B, 301. *National Bolivian Navigation Co.* v *Wilson*, L R., 5 App Cas, 209.

[5] *Levy* v. *Richardson*, W. N, (1889), Eng, 25. Ind. Contr. Act, s. 237. See also Story 127, note 2.

which were in force for two days, and they imposed restrictions on their agent's authority to pledge their credit, which restrictions were not known to those with whom the agent dealt. The agent paid for the jute purchased by his own cheques, but gave receipts for the jute in the name of his principals. One of the vendors of the jute sued the European firm for the price of the jute supplied; the Court held that the arrangement between the principal and agent as to credit not being known to the jute dealers generally or the particular dealer suing, the firm could not cut down the apparent authority by secret limitations and restrictions of which the dealer had no knowledge.[1] But the sending an agent to bid at an auction is not such conduct as is calculated to induce third persons to believe that the agent had general authority to buy. Thus in *Mackenzie, Lyall* v. *Moses*,[2] the defendant employed a broker to bid on his behalf for stationery and other articles to the value of Rs. 25 and for an iron safe to the extent of Rs. 75. The iron safe going beyond the limit was not purchased, but stationery and other articles were purchased by the broker to the value of Rs. 149-12-6, and entered in the sale sheet against the defendant. The plaintiffs called upon the defendant to take delivery; the defendant, however, refused to do so except to the extent of Rs. 25 repudiating the authority of the broker to act for him to any greater extent. The plaintiff contended that they were unaware of any limitations placed upon the authority of the broker. The case came on before the Judge of the Small Cause Court and the question referred by him to the High Court was, whether under s. 237 of the Contract Act, the act of the defendant in sending the broker to bid at the auction, was conduct calculated to induce the plaintiffs to believe that the agent's acts were within his authority? The opinion of the High Court on this reference was given by Couch C. J., who said:—"The case appears to leave it in doubt whether the authority to the broker was to bid for certain articles without reference to the sum which he was to bid, or whether his authority was not limited in both ways, limited to bid only for certain articles, and also not to bid beyond a certain sum. Whatever the authority was, the sending a man to bid at an auction cannot, we think, be considered as conduct which, to use the language of the Contract Act, induced third persons to believe he had a general authority to buy A broker's bidding at an auction for a particular article is certainly not conduct which ought to induce the auctioneer to think that the broker has authority to bid for anything that is put up for sale at that auction, to bid for everything which was going to be sold. If it were so, a person might be almost ruined by employing a broker to bid for a single article which he desired to have. There is an example applicable to the case in Story on Agency, section 129.

[1] *Grant Smith* v. *Juggobundo Shaw*, 2 Hyde, 301. See also *Spink* v. *Moran*, 21 W R, 161, and see the cases cited on this point at pp. 106—108 *ante*

[2] 22 W R., 156.

The Judge of the Small Cause Court has quoted this book, but has not noticed this section. There the learned author, speaking of the distinction between a special and general employment of an agent, and the grounds of it, says:—'The same distinction was familiarly exemplified in the Civil law by the case of an authority even to buy a single thing for the principal. If the agent was authorized to buy generally without fixing any price for the thing, the principal was bound by his purchase, at any price whatsoever. But, if the agent was limited as to price, then he could not bind the principal beyond that price. The former was a general, the latter a limited authority.' Then the authorities from the Civil law are quoted. This shows that it would be most unreasonable to say that conduct of that kind—sending a broker or agent merely with authority to bid for a particular article, or to bid a particular price, is such as to make the person liable to take and pay for every article which the person employed might think fit to bid for."

Liability of principal to have a claim of set off made against him.—Where a third person, a purchaser, has entered into a contract with an agent, and has been induced by the conduct of the agent's principal to believe, and does believe that the agent was selling on his own account, he will be entitled to set off against the principal a debt due to him from the agent.[1]

Liability of principal when he employs an agent who cannot read.—A principal who can read will not be able to dispute his responsibility to third parties on a document which he has directed an ignorant agent who is unable to read, to execute on his behalf.[2]

Liability of principal for mistake of telegraph clerk.—The principal is not, however, liable for a mistake made by a telegraph clerk in transmitting an order; for the telegraphic authorities are only agents to transmit messages in the terms in which the sender delivers them. Thus where the defendant wrote a message for transmission by telegraph to the plaintiff, ordering three rifles, and by mistake the clerk telegraphed the word "the" for "three," and the plaintiff acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number. The defendant declined to take more than three. In a suit by the plaintiff to recover the price of fifty, held, that the defendant was not responsible for the mistake of the telegraphic clerk, and that the plaintiff could only recover the price of three rifles.[3]

Where the contract by the agent is one of a different nature to that he is employed to make.—The principal will not, however, be liable for money lent to third persons when the agent purports to have entered into a contract

[1] *Cooke* v *Eshelby*, L R, 12 App Cas., 271.

[2] *Foreman* v *G W Ry. Co.*, 38 L. T., 851.

[3] *Henkel* v. *Pape*, L. R, 6 Ex. 7.

on his behalf of a totally different nature from that he was employed to make; the count for money lent being only applicable where there is an actual loan by the person who lends Thus where the defendant employed his attorney to borrow £100, giving him by way of security his title deeds The attorney borrowed £420 for the plaintiffs and delivered to them a deed of mortgage purporting to be executed by the defendant, but which was a forgery The attorney advanced to the defendant the £100 required for which a promissory note was given. The plaintiffs sued the defendant to recover the £100 The Court held that the plaintiffs could not recover, the contract with the defendant being totally different to that sought to be established.[1] Wilde B., was of opinion that although there were cases in which the agent may exceed the authority of his principal, and yet bind his principal, yet the facts in that case were not applicable to such a state of things; as there was no evidence of a loan to the defendant by the plaintiffs

Liability of Stewards for act of general manager.—Thus, where, on a programme for a fête the names of two of the defendants appeared as stewards, and the name of P as "general manager," P ordered tents and flags from the plaintiff for use at the fête. On the programme was a statement that the stewards reserved the right of altering the programme, that five should form a quorum and that tents should be provided At the fête the defendants took an active part. The plaintiff sent in his bill to the stewards. The stewards stated that every one providing things for the fête should be paid—held that there was evidence on which the Court might find that P was authorized to pledge the credit of the two defendants for the tents, and that they were therefore liable [2]

Liability in contract of a master of a ship —As the master is not merely an ordinary agent, but to some extent and for some purposes the owner of a ship for the time being, his acts not only bind his principal, as those of any ordinary agent, but he is bound by them unless he expressly confines the credit to the owner, and excludes any liability on his own part [3]

Liability of the Secretary of State —The Secretary of State is liable on the contracts of authorized agents which *are not* entered into under Sovereign powers, or in other words, for such contracts and undertakings as might be entered into by private individuals without Sovereign powers;[4] but will not be liable where the contract is one entered into with reference to Sovereign powers;[5] nor

[1] *Painter* v. *Abel*, 11 W. R, Eng, 651.

[2] *Pilot* v. *Craze*, 52 J P, 311.

[3] *Gurnam* v. *Bennett*, 2 Str., 816. *Essery* v Cobb, 5 C & P, 358 *Maude and Pollock on Shipping*, 154

[4] *P & O Steam Navigation Co* v *Secretary of State*, Bourke, 167, per Peacock, C J

[5] *Nobin Chunder Dey* v. *Secretary of State*, I L R, 1 Calc, 11; but see *Secretary of State* v *Hari Bhanji*, I. L R, 5 Mad, 273, where this ground for non-liability is dissented

will he be held liable for acts done or contracts entered into by his agents outside or in excess of, their authority. In *Beer Kishore Sahoy* v. *Government of Bengal*,[1] decided on the 6th April 1872, the plaintiff entered into a contract with Major Marshall an executive engineer to supply 2½ lacs cubic feet of kunkur; a dispute arose as to the quality of the kunkur and resulted in no more than 58,260 cubic feet being required and delivered and paid for; the plaintiff sued the Government for damages. The defendant Government contended that the executive engineer had exceeded his authority in entering into the contract. And it appeared, from a "Code of Regulations for the Public Works Department," that an executive engineer was competent to accept tenders for the execution of any sanctioned work within the amount sanctioned by competent authority, provided it did not exceed Rs. 2,000; and that the plaintiff was unable to show that this contract, which was for over Rs. 10,000, had been sanctioned by superior competent authority. The rules included in this Code had been published in the Government Gazette. Loch J., said:—"Major Marshall was simply an agent on the part of Government with limited powers; these powers have been published in the Gazette, and made known to the public ..... as Major Marshall had no authority to bind the Government, and exceeded his authority in making the contract, any payment by him cannot bind the Government. The plaintiff's suit was therefore dismissed. No attempt, however, appears to have been made to hold the agent personally liable. Again in *Rundle* v. *Secretary of State*,[2] decided in 1864, which was a suit brought by the plaintiff to have it declared that a sale held by Government was null and void, the property which had been sold having been granted by the Collector to the plaintiff and others under the Waste Land Rules, but in excess of his authority, and the Government declined to ratify his acts; held, that the Secretary of State was not liable; the case of *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*,[3] which was one brought by Government to recover an estate on the ground that it had escheated, was referred to in the judgment of their Lordships of the Privy Council as authority for the proposition that the acts of a Government officer bind the Government only when he is acting within the limits of his authority; or if he exceed that authority, when the Government in fact or in law, directly or by implication ratifies the excess; for decisions as to the liability of the Secretary of State in cases other than contract, *vide* cases under head of "Liability of Principal for Negligence of Agent."

Liability of principal for acts of sub-agent.—Where by the ordinary

from, and where such non-liability is said to be claimable only for acts done in the exercise of Sovereign powers which do not profess to be justified by Municipal Law.

[1] 17 W. R., 497; see also *Seth Dhunraj* v *Secretary of State*, 1 N. W. P H. C., 204.

[2] 2 Hyde, 25, on appeal, 36, (46).

[3] 8 Moo. I A., 529, (584).

custom of trade, or from the nature of the agency, a sub-agent must, or may be employed, the principal will be responsible to third persons for all acts done by him, just in the same manner as if he were an agent originally appointed by the principal[1] But where the agent has without authority appointed a person to act as sub-agent, the principal will not be responsible to third parties for the acts of such sub-agent.[2] Whilst where the agent has under an express or implied authority named or nominated another person to act for his principal in the business of the agency; such person is not considered to be a sub-agent, but stands in the position of an agent to the principal, and the ordinary rule as to the principal's responsibility for the acts of an agent, will apply to acts of such person.[3]

Liability of principal for agent's admissions—As an agent can only act within the scope of his authority; therefore declarations or admissions made by him as to a particular fact are not admissible, unless they fall within the nature of his employment as such agent[4] The rule admitting the declarations of an agent, is founded, says Mr. Taylor, upon his legal identity with the principal, they bind only so far as the agent has authority to make them.[5] The Indian Evidence Act enacts that statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them are admissions.[6] This section therefore leaves it open to the Court to deal with each case as it arises, upon its merits[7] The test by which it is to be decided whether the admission is binding on the principal being, is the agent under the circumstance of the case expressly or impliedly authorized to make the admission?

Principle on which agent's admissions are binding on the principal.—The principle on which admissions of an agent are supposed to be admissible against the principal are treated of by the Master of the Rolls in *Fairlie* v. *Hastie*[8] a leading case on this class of evidence, as follows:—"As a general proposition; what one man says, not upon oath, cannot be evidence against another man. The exception must arise out of some peculiarity of situation, coupled with the declarations made by one. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts.

[1] Ind. Contr. Act, s. 192.

[2] Ind. Contr. Act, s. 193.

[3] Ind. Contr Act, s. 194.

[4] *Schumack* v. *Lock*, 10 Moo, 39. *Venkataramanna* v. *Chavala Atchiyamma*, 6 Mad. H. C. 127. *Garth* v. *Howard*, 8 Bing, 451.

[5] Taylor on Evidence, para 541.

[6] Act I of 1872, s 18.

[7] See Field on Evid, note, p. 117.

[8] 10 Ves, 126.

What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality The party, therefore, to be bound by the act must be affected by the words But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against the principal" An admission made by an agent is original evidence and not hearsay, and being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them [1]

The admission must be regarding that which is the foundation of the suit, or in other words must have reference to the subject matter of the agency.—That the admission must be one with reference to the subject matter of the agency is quite clear, In *Peto* v *Hague*,[2] Lord Ellenborough says:—"What is said by an agent respecting a contract or other matter, in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal, *aliter* what is said by him on another occasion" And as says Gibbs J, in *Langhorn* v *Allnutt*[3] "When it is proved that A is agent of B, whatever A does or says or writes in the making of a contract as agent of B, is admissible in evidence because it is part of the contract which he makes for B, and therefore binds him, but it is not admissible as his account of what passes." A further rule has also been laid down, *viz*, that an admission cannot be made with reference to bygone transactions,[4] this rule does not appear to have ever been laid down in any reported case in this country, but there is little doubt that the Courts would regard such an admission, as one not "expressly or impliedly authorized" by the principal The authority to make admission is at once put an end to by the determination of the agency, whether or no the determination of the agency has been properly brought about.[5]

Rule—It appears therefore that the admission must be within the scope and nature of the agent's authority, and with reference to the subject matter of the agency, and further should have been made in the course of his employment, and at the time of the transaction And previous to their admission the agent's authority must be proved

Admission by pleader, &c.—A statement made in a case by a pleader on

[1] *Doe dem Graham* v *Hawkins*, 2 Q B, 212 Taylor on Evid, para 539

[2] 5 Esp, 134 See also *Helyer* v. *Hawke*, 5 Esp, 72.

[3] 4 Taunt, 511, (519) See also *Coats* v, *Bainbridge*, 5 Bing, 58.

[4] *Great Western Ry Co* v *Willis*, 31 L J. C P, 195

[5] *Kalee Churn Rawanee* v. *Bengal Coal Co.*, 21 W. R., 405.

behalf of his client after full consideration, and consultation, has been held to bind the client in another suit to which he is a party.[1] This case, however, is very meagrely reported, and it does not appear in what way the prior admission was connected with the second suit, further than by a bald statement that in the first suit "the plaintiff's claim was admitted and it was proposed to allow the claim to be satisfied out of profits of the very mouzah which it is alleged the defendant in the second suit held in izarah." So where a person sued as a *shaffee khullit* for possession of a four-anna share in a zemindari, in which suit the defendant's pleader admitted that his client was not a *shaffee khullit*, but claimed as a *shaffee jur*, the Court held that the defendant was bound by the admission of his pleader, and that a *shaffee khullit* having a preferable title under Mahomedan law was entiled to recover.[2] But an admission made by a vakil cannot bind his client in a criminal case.[3] Neither is a mooktear authorized under the Limitation Act of 1859, to bind his client by an admission of title.[4] But an application made by a pleader on behalf of his client authorized by vakulatnamah for the purpose of postponing an execution sale has been held under the Limitation Act of 1877, s. 19, to be a sufficient acknowledgment by the pleader of his client's liability in respect of the right of the decree-holder to immediate execution of his decree, so as to bind the client thereby, and give a fresh starting point from which limitation would run.[5] And a similar view has been taken by the Calcutta High Court on an application made by a vakil for additional time for payment of the amount of a decree.[6] With reference to admission of fact by agents; no fact need be proved which the parties or their agents agree to admit at the hearing,[7] or which before the hearing they agree to admit by any writing under their hand,[8] or which by any rule of pleading, in force at the time they are deemed to have admitted by their pleadings."[9]

Admission by partners.—Each member of a firm being the agent of the others for all purposes within the scope of the partnership business, admissions

[1] *Oomabuttee* v. *Parushnath Pandey*, 15 W. R., 135

[2] *Hur Dyal Singh* v. *Heera Lall*, 16 W. R., 107

[3] *Queen* v. *Kazim Mundle*, 17 W. R. Cr., 49.

[4] *Luchmee Buksh Roy* v *Runjeet Ram Panday*, 13 B. L. R., 177.

[5] *Ramhit Rai* v. *Satgur Rai*, I. L. R., 3 All., 248. *Fateh Muhammed* v *Gopal Dass*, I. L. R., 7 All., 429.

[6] *Ram Coomar Kur* v. *Jakur Ali*, I. L. R., 8 Calc., 716, 10 C. L. R., 613. *Toree Mahomed* v. *Mahomed Mabood*, I. L. R., 9 Calc., 730; 13 C. L. R., 91.

[7] *Rajunder Narain Rae* v *Bijaygobind Sing*, 2 Moo. I. A., 253. *Khajah Abdool Gunnee* v. *Gour Monee Debia*, 9 W. R., 375. *Kower Narain Roy* v *Sreenath Mitter*, 9 W. R., 485. *Kaleekanund Bhuttacharyee* v *Gureebala Debia*, 10 W. R., 322. *Dossee* v. *Pitambur Pundal*, 21 W. R., 332.

[8] Act XIV of 1882, s. 128

[9] Act I of 1872, s. 58.

by one (provided the Court regards him as authorized to make the admission) are binding on all, unless, under the special circumstances of the case, an intention can be inferred; that a particular act should not be binding without the direct concurrence of each individual partner.[1] Mr. Lindley says, the admission of one partner with reference to a partnership transaction are *evidence* against the firm,[2] but are not necessarily conclusive.[3] And it has been held that even after dissolution an admission by one partner as to a payment of a debt due to the firm will bind the others.[4] But as to this case, Mr. Taylor remarks, that had the person making the admission not been jointly interested, as far as the debt was concerned, with the person against whom his statement was tendered in evidence, the decision would have, in all probability, been the other way.[5] But even during the continuance of the partnership, one partner cannot acknowledge a debt, or make a part payment, or payment of interest so as to give a new period of limitation binding on the firm, unless specially authorized in writing so to do.[6] The admission of a partner as to a subject not of co-partnership, but of conjoint ownership in a vessel, is not binding on his co-partner.[7]

Admission by a wife—Where a husband has permitted his wife to act for him in any department of business, her admissions or acknowledgments in respect of such business are admissible in evidence against him;[8] but she cannot bind him by admissions, unless they fall within the scope of the authority which she may reasonably be presumed to have derived from him.[9]

Declarations of deceased agent when admissible.—Statements, written or verbal, of relevant facts made by an agent who is dead are admissible, when the statement is made by the agent in the ordinary course of business,[10] and in particular when it consists of an entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duties, or when such statement is an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.[11]

[1] *Latch* v. *Wedlake*, 11 A. & E., 959. Taylor on Evid., para. 598.

[2] *Wood* v *Braddick*, 1 Taunt., 104.

[3] *Wickham* v. *Wickham*, 2 K. & J., 491. Lindley on Partnership, 128.

[4] *Pritchard* v. *Draper*, 1 Russ. & My., 191.

[5] See Taylor, para. 586 See also Act I of 1872, *s.* 18, (1), (2).

[6] Act XV of 1877, s 21

[7] *Jaggers* v. *Bennings*, 1 Stark, 14.

[8] *Clifford* v. *Burton*, 8 Moo., 16.

[9] *Meredith* v *Foster*, 11 M & W., 202; 12 L J. Ex., 183.

[10] *Stapylton* v. *Clough*, 2 El & Bl., 933.

[11] Ind. Evid. Act, s. 32.

Liability of principal by reason of notice given to the agent. Actual notice—Actual notice to the agent is, (under certain conditions) constructive notice to the principal himself.[1] For if this were not so, it would cause great inconvenience, and notice might be avoided in every case by employing an agent. And for the same reason, information obtained by an agent has (under certain conditions) the same effect as though it had been obtained by the principal himself.[2] It has often been said that the knowledge of the agent is the knowledge of the principal; but this phrase has been elaborately criticized by the Master of the Rolls in *Blackburn* v. *Vigors*,[3] and is there said by his Lordship to be "evidently too large," "and if literally applied, it would often be wickedly untrue;" and Lord Halsbury in the same case,[4] on appeal before the House of Lords says, "Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal, other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal: and whether his acts are the acts of his principal depends upon the specific authority he has received ..... Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct, but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application."

Constructive notice.—Constructive notice has been defined as evidence of notice, the presumption of which is so violent, that the Court will not allow of its being contradicted.[5] The doctrine of constructive notice depends upon two considerations, first, that certain things existing in the relation or the conduct of parties, or in the case between them, beget a presumption so strong of actual knowledge, that the law holds the knowledge to exist, because it is highly improbable it should not; and next, that policy and the safety of the public, forbids a person to deny knowledge, while he is so dealing as to keep himself ignorant, and yet all the while let his agent know, and himself, perhaps, profit by that knowledge.[6] The principles upon which this doctrine rest are also

[1] *Vane* v. *Vane*, L. R., 8 Ch., 383, (399) *Bradley* v. *Riches*, L. R., 9 Ch, 189, (196).

[2] *Proudfort* v *Montefiore*, L. R., 2 Q. B., 511.

[3] L. R., 17 Q B D, 553, (557).
Blackburn Low & Co. v. *Vigors*, L. R., 12 App. Cas, (538).

[4] Per Eyre C. B., in *Plumb* v. *Fluitt*, 2 Anst., 438. White & Tud., L. C., 45, *Le Neve* v *Le Neve*.

[5] *Kennedy* v. *Green*, 3 My. & K., (719), per Lord Brougham.

referred to in *Bousot* v. *Savage*.[1] Constructive notice, however, of course merges in actual notice, for there can only be constructive notice, where actual notice is not alleged.[2]

Notice when effective as between principal and third parties—The notice given to, or the information obtained by, the agent, must, however, in order to affect the principal have been given to or obtained by him *in the course of the business transacted by him for the principal*,[3] for if it were not so, as says Lord Hardwicke in *Warrick* v. *Warrick*,[4] "it would make purchasers and mortgagees' titles depend altogether on the memory of their counsellors and agents, and oblige them to apply to persons of less eminence as counsel, as not being so likely to have notice of former transactions" This rule is exemplified by the case of *Dresser* v. *Norwood*,[5] which on account of it being taken as one of the two illustrations to this section may be usefully set out at length. There, two cargoes of timber were consigned by Dresser to one Holderness for sale on *del credere* commission, and who had accepted bills drawn upon him on account: Holderness, being an importer of timber on his own account, was in the habit of selling as factor for others, and had on two occasions sold timber for the defendant Norwood. These sales were usually by public auction; catalogues being issued stating the description and quantities of timber to be sold, but not whose timber it was; having printed at the end of them "J. W. Holderness, and Co., merchants, J. B. Ward, auctioneer," Ward being a clerk of Holderness and Co. The timber consigned by Dresser to Holderness was put up at one of these sales (a copy of the catalogue containing it being sent to the plaintiff,) and bought in. Afterwards one Marmaduke Chaplin, who had formerly been a clerk to Holderness, but who was then in business for himself as a broker, entered into a negotiation for the purchase of this timber by private contract, and bought it in the usual way, for cash, payable in a month, less 2½ per cent. discount, without disclosing the name of his principals Holderness, knowing Chaplin not to be a man of substance, declined to give him a delivery order; whereupon Chaplin offered him Messrs. Norwood's guarantee which Holderness accepted. Upon receipt of this guarantee, Holderness delivered the timber to vessels sent by the defendants, and sent Chaplin an invoice of the timber. Chaplin knew that the timber was the property of Dresser, he having applied to him to let him have the sale of it, but the defendants were not aware of this fact. Holderness became bankrupt, and

[1] L. R., 2 Eq, 142.

[2] *Wilde* v. *Gibson*, 1 H. L. Cas., (628).

[3] Ind Contr Act, s 229.

[4] 3 Atk., 294. See also *Worsley* v *Scarborough*, 3 Atk., 392. *Finch* v. *Shaw*, 19 Beav, 504, (515).

[5] 14 C. B. N. S., 574; 32 L. J. C. P, 201.

Dresser gave notice to Norwood that the timber belonged to him and demanded the price. The defendants, however, insisted upon their right to set it off against the dishonoured acceptances of Holderness:—Erle J., after finding that Holderness was authorized to sell the timber, as factor, in his own name, and as if the timber were his own property, said:—"The next step for the defendants to make out was that they bought the goods in ignorance of the plaintiff's interest in them. The evidence shows, I think, that the defendants did *bonâ fide* believe the goods to be the goods of Holderness, and not the property of the plaintiff. It appears that the defendants employed one Chaplin, a broker, to buy the goods for them, and that Chaplin, at the time he bought them, had in his mind a knowledge of the fact that the goods were the property of the plaintiff, and not of Holderness. It stands as an uncontroverted fact in the case, that the knowledge of Chaplin that the goods were the property of the plaintiff *came to him before he was employed as the agent of the defendants and entirely distinct from that employment, and whilst* he was in the service of Holderness. Before he stood in any relation to the defendants, Chaplin, knowing the timber to be the property of the plaintiff, he having then left the service of Holderness and commenced business as a broker on his own account, applied to the plaintiff to be allowed to sell. No information as to the ownership of the goods ever came to Chaplin in the course of the transaction between him and the defendant Holderness, though I will assume that Chaplin was perfectly aware of the fact of the timber being the property of the plaintiff. Under these circumstances, I am of opinion that the rights of the defendants are not affected by anything which came to the knowledge of Chaplin before he became the agent of the defendants. The general rule, I apprehend is, that whatever an agent does within the scope of his employment, and whatever information comes to h m in the course of his employment as agent, binds his principal. Where an agent is employed to make a purchase, the principal is affected by all the knowledge acquired by the agent which would have affected the principal if he had conducted the transaction himself. Anything which comes to the knowledge of the agent in the course of the transaction binds his principal; but the principal is not bound by any knowledge previously possessed by the agent, and which may or may not be in his memory at the time he is acting for him..... The case of *Fuller* v. *Benett*,[1] and the authorities referred to in 2 Tudor's Leading Cases in Equity 49, 53, appear to me to lay down the doctrine to the effect that I have imperfectly stated it, *viz.*, that the knowledge of the agent acquired in the course of the particular transaction, and in reference to the transaction in which he is acting as agent, binds the principal, but that the latter is not bound by anything

[1] 2 Hare, 394.

which was or might be in the mind of the agent before the commencement of the relation between them." Willes J., distinguished the case from the decisions on the subject given by Courts of Equity, and added, "I am not disposed to depart from the general rule acted upon in our Courts, that the acts of one man, are not to affect the interest of another who does not authorize them, and the same rule is applicable to knowledge, always excepting the rule of fraud, as to which I reserve my opinion until circumstances arise which may call for an expression of it." Keating J., also said:—"Upon the simplest principles which govern the relation of principal and agent, one who employs an agent invests him with authority to do everything that is necessary to the performance of the duty intrusted to him, and is affected with notice of all information acquired by him in the course of the transaction, as if the principal were transacting it himself. But there is no authority for saying that the doctrine of constructive notice is to be carried beyond this in a Court of law ....." This case was subsequently overruled,[1] but the law in this country follows the decision which was so overruled. An extension of this rule has been at one time allowed in England, namely, that where a transaction is closely followed by, and connected with another, or where it is clear, that a previous transaction was present to the mind of the agent when engaged in another transaction, there is no ground for the distinction by which the rule, that notice to the agent is notice to the principal had been restricted to the transaction;[2] but this view is expressly excluded by the Indian Contract Act, and it has moreover in England been cut down by 45 and 46 Vic. c. 39, and the law as laid down in *Warrick* v. *Warrick* restored.

Whether the knowledge must be material to the business transacted.—The question whether or no, to affect a person with constructive notice of facts within the knowledge of his agent, it is necessary not only that the knowledge should be obtained in the course of the business transacted by him for his principal, but also that the knowledge must be *material to the business to be transacted*, and such as it is the duty of the agent to communicate, does not appear to be dealt with by s. 229 of the Indian Contract Act; this question, under English law, has been answered in the affirmative. In *Wylie* v. *Pollen*[3] Lord Westbury has said:—"To affect the principal with notice, the agent's knowledge must have been derived in the particular transaction in hand ..... and further it must have been knowledge of something material to the particular transaction, and something which it was the agent's duty to communi-

[1] *Norwood* v *Dresser*, 17 C B (N. S), 466.

[2] *Hargreaves* v. *Rothwell*, 1 Keen, (159). *Brotherton* v. *Hatt*, 2 Vern., 574 See as to these cases the remarks of the Vice-Chancellor in *Fuller* v. *Benett*, 2 Hare 391, (405). See also *Seedee Nuseer Ali Khan* v. *Ojoodhya Ram Khan*, 8 W. R., 399, (406).

[3] 3 DeG. J & S., 596.

cate to his principal, the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent."

Whether the employment of a person by an agent to do a ministerial act constitutes that person an agent so as to affect the principal with notice of his knowledge.—Nor does the Indian Contract Act make any express exception from the rule laid down as to notice in section 229, where the employment of the agent is to do a merely ministerial act, such as the procuring the execution of a deed,[1] or the search of the register for incumbrances.[2] But it is enacted that if the sub-agent be properly appointed,[3] he is to be considered the agent of the principal as far as the principal's liability to third parties is concerned, and it may therefore be taken that notice to such sub-agent would be notice to the principal, and it is probable, that any notice or information acquired or obtained by the agent himself in the course of the business transacted by him for his principal, even though such business be only ministerial, might be held to affect the principal with constructive notice of matters so coming within the agent's knowledge, as the words of the section appear to be wide enough to do so. It will be seen that the case of *Wyllie* v. *Pollen*[1] above cited, is an authority to the effect that the employment of a person employed by an agent to do a merely ministerial act, such as the execution of a deed, does not so constitute him an agent of the principal as to affect the principal with constructive notice of matters within the knowledge of the person employed by the agent; but in that case it was expressly held that the person employed by the agent was not acting in the transaction as the agent of the principal.

Exception to the general rule.—Although the general rule is, that notice to a solicitor is notice to the client, when such notice is acquired in the course of the business which is being transacted by him for the client, yet where the disclosure of a fact of which notice is sought to be fixed upon a client, imputes fraud to the solicitor, it is not to be presumed that the solicitor will make disclosure of that fact to his employer, and the client will not be constructively affected thereby.[4] This exception has, however, been held not to apply where the fraud is not independent of the concealment of some fact, but itself consists in the concealment, and in such case notice is imputed to the principal on the ground that a solicitor is to be presumed to have communicated all that is his duty to have communicated[5]; in *Rolland* v. *Hart*[6] a solicitor induced a client to advance money for another, and soon after-

[1] *Wylie* v. *Pollen*, 3 DeG. J. & S., 596.

[2] *Fowon* v. *Gascoigne*, (note), L. R., 9 Ch., 658.

[3] Ind. Contr. Act, ss 192, 194.

[4] *Kennedy* v *Green*, 3 My. & K., 699, (723). *Waldy* v. *Gray*, L. R., 20 Eq., 238, (251-252).

[5] *Atterbury* v. *Wallis*, 8 DeG. M. & G., 454.

[6] L. R., 6 Ch., 678, (682).

wards induced a second client to advance money on mortgage of the same land without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered; held that the holder of the second mortgage must be taken to have had, through the solicitor notice of the first mortgage, and could not by the prior registration obtain priority Lord Hatherly said:—"I think, with Lord Justice Turner that the question how far you are justified in assuming that the agent does not communicate to his client information which he has received, and ought to have communicated may be affected by very delicate shades of difference. It might be said that the very fact of the solicitor not having communicated an important circumstance is of itself evidence of fraud. But Lord Justice Turner in the case of *Atterbury* v. *Wallis*, exactly meets that difficulty, and says that such a rule cannot prevail. It must be made out that distinct fraud was intended in the very transaction, so as to make it necessary for the solicitor to conceal the facts from his client in order to defraud him. In *Kennedy* v. *Green* the facts were not communicated" It must, however, be remembered that to make English cases apply to this country on the question of notice, it must be shewn that the information was acquired by the solicitor *in the course of the business transacted by him for his principal.* It is a question whether the neglect of purchasers to search the Registry and inquire for incumbrances affects them with constructive notice of a lien, see *Kettlewell* v. *Watson*[1] Similarly where a solicitor acting for both parties in a mortgage transaction has notice of the existence of a document, but with the consent of one of such parties conceals his knowledge from the other party, the latter will not be affected with constructive notice of such document[2] In the case referred to as authority for this proposition, the solicitor was acting for both mortgagor and mortgagee, and on being informed by the mortgagor of the existence of a document which would have deterred the mortgagee from advancing his money, said that he should not communicate the information to his client the mortgagee, as it might make him feel nervous about advancing his money. Sir W Page Wood, as to this, said:—"When he the solicitor gave that answer, it was the duty of mortgagor and his wife to go further, and communicate with the intending mortgagee himself, and the Court can only treat there not doing so, as a conspiracy with Clarke (the solicitor) against his client. It would be an encouragement of fraud to apply the rules of notice, which were established for the safety of mankind to a transaction like this. Similarly on a somewhat analogous principle to that laid down in *Kennedy* v. *Green*,[3] the doctrine of

[1] L. R, 26 Ch D, 501, and *Doorga Naram Sen* v. *Baney Madhub Mozoomdar*, I. L. R, 7 Calc., 201, (205).

[2] *Sharpe* v. *Foy*, L R, 4 Ch App, (40).

[3] 3 My & K, 699.

constructive notice has been held not to apply to cases where the person seeking the benefit of that doctrine has been guilty of secrecy in the transaction with constructive notice of which he seeks to affect a purchaser.[1]

Carelessness in obtaining information, effect of on a purchaser.— Where a person is proved to have had a knowledge of certain facts, or to have been in a position, the reasonable consequence of which knowledge or position would be, that he would have been led to make further enquiry, which would have disclosed a particular fact, the law will fix him with having himself had notice of that particular fact; for there may be such wilful negligence in abstaining from enquiry into facts which would convey actual notice, as may properly be held to have the consequences of notice actually obtained; but if there is not actual notice, and no wilful or fraudulent turning away from an enquiry into, and consequent knowledge of facts which the circumstances would suggest to a prudent mind, then the doctrine of constructive notice ought not to be applied.[2] Thus where one Baney Madhub, who was the owner of a tenure under two leases, one of which was in his own name and in the other in the name of his cousin, whilst in prison for an offence under the Penal Code gave a power of attorney to his cousin and to two other persons containing an authority to any two of them to sell his property if occasion required Previous to his imprisonment a suit had been instituted against him for arrears of rent by one of his zemindars, which suit was decreed pending the imprisonment, and the tenure was in execution sold and purchased in the name of one Gopal Das; and subsequently two of the attornies, one of whom was the cousin, conveyed the other leasehold tenure to Gopal Das and Chota Rankal Das ostensibly for valuable consideration. Some time after this, one Doorga Narain Sen became the purchaser of both the tenures under a kobala executed by Gopal Das and Chota Rakhal Das. On Baney Madhub Mitter's discharge from prison, he took proceedings under the Criminal Procedure Code to obtain possession of these properties, and an order was made, giving him possession, whereupon Doorga Narain Sen brought a suit against him to recover possession, as a purchaser for value without notice. The lower Court dismissed the suit, holding that the plaintiff had notice at the time of his purchase, that the sales and conveyances to Gopal Das and Rakhal Das from the two attorneys were benami transactions for Baney Madhub. First, because the recitals of the conveyances were sufficient to put him upon enquiry, secondly, that at all events he was fixed with constructive notice, because he did not ask for the accounts or zemindary papers and did not obtain the deeds. Pontifex J., found that the plaintiff had made enquiry from one of the attornies of Baney Madhub as to whether there was any harm in purchasing, and had been

[1] *Hormasji Temulji* v. *Mankuvarbai*, 12 Bom H. C., 262.

[2] Per Pontifex J., in *Doorga Narain Sen* v, *Baney Madhub Mozoomdar*, I. L. R., 7 Calc, 201.

told that there was not, and that the zemindary papers were actually given to the plaintiff on his purchase; and held that with respect to his not obtaining the deeds, such negligence might be important as against a third person with whom they might have been deposited for value, but it was of comparative unimportance as against Baney Madhub, who had placed his affairs in the hands of attornies, one at least of whom had assured the plaintiff that he was safe in purchasing; that moreover the neglect to ask for deeds, in a country where registration prevailed, applied with but slight force; and that there was therefore no ground for fixing the plaintiff with constructive notice that the transactions were benami; and that as the Court below had not found that there was any actual notice, and as the circumstances of the case were insufficient to fix the plaintiff with constructive notice, the plaintiff must be considered to be a purchaser for value without notice[1] The rule referred to by Pontifex J., is more stringently laid down in the case of *in re Hall and Company*,[2] in which Sterling J., adopts the views of Lord Cranworth,[3] regarding the application of the doctrine of constructive notice, namely, "that where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist; but where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down." And in connection with this rule, the case of *Fuller* v *Benett*,[4] should be referred to, in which a continuous dealing with the same title by a solicitor acting for all parties, was held to be within the transaction in which he was employed. There, pending a treaty for sale to one Benett, the vendor agreed to give a creditor a mortgage on the estate to be sold, and notice of the agreement was given to the purchaser's solicitors, and then the treaty for sale ceased for upwards of five years, and the vendor dying, the purchaser bought the estate from his representatives and mortgaged it; the same solicitors Messrs. Farrer and Company having been concerned for the purchaser from the

[1] *Doorga Narain Sen* v *Baney Madhub Mozoomdar*, I L. R., 7 Calc, 199

[2] L R, 37 Ch D, 720.

[3] *Ware* v. *Egmont*, 4 DeG., M & G., 460 *Espin* v *Pemberton*, 4 Drew., 333

[4] 2 Hare, 394

commencement of the treaty for sale until the purchase, and also for Majoribanks the mortgagee—held that the mortgagee was fixed with notice of the creditor's charge. The Vice-Chancellor, after stating, that the rule that notice to a solicitor will not bind the client unless it be in the same transaction, or at least during the time of the solicitor's employment in that transaction, had been always understood by him to be a rule *positive juris* adopted by Courts in favour of innocent purchasers said, "in the case before me I consider it to be immaterial whether the treaty between Sir J. F. Dillon and Mr Benett, (the first treaty for sale) and that between Mr. Benett and Messrs. Dillon after Sir J. F. Dillon's death, (the treaty which terminated in the actual sale) were the same or not—whether the latter was a continuance of the first or a new treaty,—Messrs. Farrer and Company were the solicitors of the defendant Benett from the commencement of the treaty in 1831, to its close. The notices of the plaintiff's (the creditor's) interest were given to them in March 1832, as the solicitor of Benett. Those notices were retained and preserved by them; and in this suit they come out of their possession from the answer of their clients ..... I cannot discover any ground upon which Mr. Benett can escape from the consequences of the notice. If Mr. Benett is bound by the notice, Mr. Marjoribanks (the second mortgagee) mut be bound by it also, not because abstractedly he is to be bound by facts which came to their knowledge of his solicitor in other transactions, but because the solicitor he employed in the business of the mortgage had notice of the plaintiffs (the creditor who had a charge) interest, as the solicitor of the mortgagor, in the very transaction in which he the mortgagee so employed him."

How far an insured is affected by information acquired by agent who is not the agent through whom the policy is affected —Although where an insurance is effected through an agent, non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good grounds for avoiding the contract; yet the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. Thus where the plaintiff instructed a broker to effect for him a re-insurance upon an overdue ship; and whilst the broker was acting on behalf of the plaintiff, he received information of a material fact tending to show that the ship was lost; the broker did not communicate this information to the plaintiff, and failed to obtain an insurance for him. Afterwards the plaintiff, through another broker, effected a policy of insurance, lost or not lost, which was underwritten by the defendant. The ship had in fact been lost some time before the plaintiff tried to re-insure her, but neither the plaintiff, not the broker who effected the insurance, knew of or concealed from

the defendant any fact tending to show that the ship had been lost. The defendant sought to resist payment of the policy of insurance, lost or not lost, on the ground that he was not informed of the fact tending to show the ship was lost which was within the knowledge of the first broker who failed to obtain the insurance, contending that the knowledge acquired by him whilst endeavouring to effect the insurance must be imputed to the plaintiff; and in support of this contention his counsel cited the cases *Fitzherbert* v. *Mather*,[1] *Gladstone* v. *King*,[2] *Proudfoot* v. *Montefiore*[3] and *Stribley* v. *Imperial Marine Insurance Company*,[4] Day J., held that the non-communication of the information referred to did not vitiate the policy; The Court of Appeal,[5] Lindley and Lopes L. JJ., Lord Esher M. R., dissenting, reversed the decision of Day J, and held that the plaintiff could not recover upon the policy underwritten by the defendant. On appeal to the House of Lords,[6] the decision of the Queen's Bench Division was reversed; Lord Halsbury said:—"What then is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal? He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case, the knowledge was acquired, not because he was the agent of the assured, but, from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge." Lord Watson said:—"In this case it is sought to extend the imputed knowledge of the insured to all facts which during the period of his employment became known to any agent, other than the agent effecting the policy in question, who was employed at any

[1] 1 T. R., 12.
[2] 1 M. & S., 34.
[3] L. R., 2 Q. B., 511.
[4] L. R., 1 Q. B. D., 507.
[5] *Blackburn, Low & Co.* v. *Vigors*, L. R., 17 Q. B. D., 553.
[6] *Blackburn, Low & Co.* v. *Vigors*, L. R., 12 App, Cas., 531.

time successfully or unsuccessfully, to insure the whole or any part of the same risk with that covered by the policy. This is a case of re-insurance, but it is obvious that the principle, if admitted, would be equally applicable to the original contract. I am of opinion, with your Lordships, that the responsibility of an innocent assured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated, in due course, to his principal. So also when an agent to insure is brought into contract with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing."

Doctrine ought not to be extended—"It has frequently been said by eminent Judges, says Lord Macnaghten in the case last cited, "that the doctrine of constructive notice ought not to be extended. It seems to me that the decision under appeal involves a great and a dangerous extension of that doctrine. There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent to whom the management of that property is committed possessed at the time and might in the ordinary course of things have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information, but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal.

But that is not because the knowledge of the agent is to be imputed to the principal, but because the agent of the assured is bound, as the principal is bound, to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication; *Lynch* v. *Dunsford*,[1] ..... it would in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information, are to be affected with the knowledge of matters which other persons may be morally though not legally bound to communicate to them." The case last cited must, however, be compared with the case of *Blackburn* v. *Haslam*,[2] in which the same plaintiffs employed a firm of insurance brokers to re-insure a ship which was overdue: and the brokers received information tending to show that the ship, as was the fact, was lost; but without communicating this information to the plaintiffs, they telegraphed in the plaintiffs' name to their own London agents, stating the rate of insurance praemium which the plaintiffs were prepared to pay. The reply to this telegram was sent direct to the plaintiffs, and communications subsequently followed between the plaintiffs and the London agents and the London agents; through a firm of London Insurance brokers, effected a policy of re-insurance at a higher rate of praemium, which policy was underwritten by the defendant; the Court on these facts held that the policy was void on the ground of concealment of material facts by the agents of the assured; considering that the case was distinguishable from that of *Blackburn, Low and Company* v. *Vigors*,[3] as the opinion expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, must be taken, as applying to the particular facts of the case then before the House of Lords, which shewed that, before the negotiation for the policy sued upon had commenced, all connection of the plaintiff with his former brokers had ceased, and not as applying to a case, the facts of which show that so far from the connection between the principals and their agents ceasing, the brokers use the name of the principals to continue negotiations, and the principals adopt the act and themselves continue and carry out what their broker had commenced.

[1] 13 East., 494.
[2] L. R., 21 Q B. D., 144.
[3] L. R., 12 App. Cas., 531.

PART II.—LIABILITY OF PRINCIPAL TO THIRD PARTIES FOR AGENT'S WRONGFUL ACTS AND NEGLIGENCE.

General rule as to principal's liability—Definition of negligence—The act must be done within the scope of the agent's employment—Principal must have complete control over the work done by the agent—Principal's liability for contractor's servants—Liability for contractor's servants where employer selects his own servants—Duty imposed on employer to see work properly carried out—Ground for the rule under earlier authorities—Liability of owners of carriages let to hire who select the coachman—Where hirer selects the coachman—Liability under Statute of proprietors of cab and horses to third persons for negligence of cab-driver—Non-liability of master for injury caused by a servant to fellow servant; Common employment—Principle of this exception—Is common master essential to common employment—Liability of Corporation for breach of statutory duty—Liability of managing owners for negligence of captain—Managing owner's liability for pilot's negligence—Liability for agent's wilful and malicious acts—Liability of principal for directions given to Sheriff to seize goods of wrong person—For mistake in excess of agent's authority—Liability of common carriers—Qualifications of the principal's liability for negligence of agent—Distinction between doctrine of contributory negligence and *volenti non fit injuria*—Act of God—*Vis major*—Natural forces—Accidental injury—Liability of Secretary of State for negligence of agent.

Liability of principal for wrongful acts and negligence of agent. General rule as to principal's liability.—The principal is responsible to third parties for the wrongful or negligent acts of his agent committed whilst engaged in the course of his employment; but not for acts of negligence done by the agent out of the scope of his authority or inconsistent with the course of his employment.[1] There can be no question as to his liability where he has expressly directed the wrong to be done, for *qui facit per alium facit per &c.*; or where he has given directions which could be executed only by its commission,[2] or where he has ratified the act.[3] But the question of his liability is not to be determined by whether or no the agent had authority to do the act, but whether when so acting, he was acting in the scope of his employment in the business of his principal.

Negligence.—Legal negligence implies a neglect of duty to do or to forbear

[1] *Coleman* v. *Riches*, 16 C. B., 104. *Stevens* v. *Woodward*, L. R, 7 Q. B. D., 318. *Scott* v. *Shepherd*, 2 Wm Bl., 892

[2] *Smith's Merc. Law*, 144. *Gregory* v. *Piper*, 9 B & C., 591.

[3] *Rani Shamasundari Debi* v. *Dukhee Mandal*, 2 B. L. R., (O. C. J.), 227. *Abdoola bin Shaik Ally* v. *Stephens*, 2 Ind Jur., O. S., 17, a case of public officer as principal.

from doing an act. "It is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do."[1] The usual question put in determining whether there is evidence of negligence is therefore the question whether a duty exists to do that which was left undone, or not to do what was done; if that question can be answered in the affirmative, then there is negligence. The test by which the acts or omissions are to be adjudged is found in the question whether or no the acts or omissions would have been committed by a prudent man when placed in the position of the man who is alleged to have caused neglect, or in other words on the question, what would a prudent man have done under the circumstances of the particular case then before the Court?

To make the principal liable, the act must be one done within the scope of the agent's employment.—In the generality of cases founded on negligence, it will be found that the agent or servant has committed the act in violation of his duty to his employer; and this, as has been mentioned above, excludes the act from falling within the authority of the agent, and shows that the question of authority or no authority is not the test of the principal's liability. The act must be done in the performance of the business of the principal, and within, therefore, the scope of his employment. If the act is committed outside the scope of the employment or is one inconsistent with the course of his employment, the principal will not be liable.[2] What is, or, is not outside the scope of his employment, is, of course a question of fact. If the agent goes beyond the course of his employment, for his own purposes, to do some act on his own account, unconnected with the principal's business, the principal will not be liable; but nevertheless it is not every deviation from the course of the agent's employment, which will relieve the principal from responsibility; but there must be a total departure from the course of the principal's business, and not merely a deviation taken on the servant's own account.[3]

The principal must have complete control over the work done by his agent—The principal or master must, to be liable for the agent's or servant's negligence, have complete control over the work done by his agent or servant, he must retain in himself the power of controlling the work;[4] the relationship

[1] *Blyth* v *Birmingham Waterworks Co*, 11 East, 784.

[2] *Mitchell* v. *Crasweller*, 13 C. B, 237. *Storey* v. *Ashton*, L. R., 4 Q. B., 476. *Coleman* v. *Riches*, 16 C B, 104. *Joel* v. *Morrison*, 6 C. & P., 501. *Middleton* v. *Fowler*, 1 Salk., 282. *Rayner* v. *Mitchell*, L. R, 2 C P. D., 357.

[3] *Rayner* v. *Mitchell*, L. R., 2 C. P. D., 357. *Whatman* v. *Pearson*, L. R., 3 C. P., 422. Pollock on Torts, p. 74.

[4] *Jones* v. *Corporation of Liverpool*, L. R, 14 Q. B, D., 890. See *Bombay Trading Company* v. *Khairaj Tejpall*, I. L. R., 7 Bom, 119. *Powles* v. *Hider*, 25 L J. Q B, 331. *Fowler* v *Locke*, L R., 7 C. P 272 *Venables* v *Smith*, L R, 2 Q B. D, 279.

of master and servant must be distinguished from that of an employer and an independent contractor undertaking work for the employer, as such contractor will not render liable to third persons the employer, if during the course of the work he is carrying out he is guilty of negligence; he not being under the control of the employer.[1] For he who controls the work is alone answerable for the workman.[2] In ascertaining who is liable for the act of a wrongdoer, you must look to the wrongdoer himself, or to the first person in the ascending line who is the employer and has control over the work; you cannot go further back, and make the employer of that person liable.[3] Nevertheless the remoter employer may make himself liable to third parties, if, he, at any time, interferes or assumes specific control, but in such case he is not an agent, but a principal,[4] and slight evidence of such interference has been held sufficient to render him liable.[5]

Liability for contractor's servants.—Where a person voluntarily entrusts work to a contractor who selects and employs his own servants, such person will not generally be liable for any injury caused to third persons by the contractor's servants in the course of carrying out such work.[6] But where a person authorizes lawful work, or work from which, if properly done, no evil consequences can arise, he is not liable for the negligence of the contractor's servants;[7] but if the work is unlawful, or the injury is a natural consequence of the work even when properly executed, then he is liable. Thus in *Ellis* v. *Sheffield Gas Consumer Company*,[8] the defendant contracted with Watson Brothers to open trenches along the streets of Sheffield in order that the defendants might lay gas pipes there, and afterwards to fill up the trenches and make good the surface and flagging. The trenches were opened by the servants of Watson, and after the pipes were laid they proceeded to fill up the trenches and restore the flagging. In doing so, the servants of Watson Brothers carelessly left a heap of stones and earth upon the footway, and the plaintiff passing along the street, fell over them and broke her arm. Neither the defendants nor Watson Brothers had any legal excuse for breaking open the street, which was a public one. It was objected for the defendants that the cause of the accident was the negligence of the servants of Watson Brothers, for which they alone

[1] See Pollock on Torts, p 69. *Sadler* v. *Henlock*, per Crompton J, 4 E. & B, 578.

[2] *Milligan* v. *Wedge*, 11 A & E, 757. *Goslin* v *Agricultural Hall Co*, 34 L. T N. S., 59. *Abbotts* v. *Freeman*, 34 L. T. N S., 544.

[3] *Murray* v. *Currie*, L R, 6 C. P., 24, (27).

[4] *McLaughlin* v. *Pryor*, 4 M. & G, 48, per Willes J.

[5] *Burgess* v. *Gray*, 1 C B., 578 Pollock on Torts, 71.

[6] *Rapson* v. *Cubitt*, 9 M. & W., 710. *Allen* v *Hayward*, 7 Q B, 960. *Overton* v. *Freeman*, 11 C. B 867. *Milligan* v. *Wedge*, 11 A & E, 757.

[7] *Ullman* v. *Justices of the Peace from Town of Calcutta*, 8 B L R, 265, (276)..

[8] 2 El & Bl., 767.

were responsible. It was answered that the contract was to do an illegal act, *viz*, to commit a nuisance, and, that being so that the defendants were responsible. Lord Campbell said :—"I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases which have been cited.[1] In those cases the contractor was employed to do a thing perfectly lawful; the relation of master and servant did not subsist between the employer and those actually doing the work; and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and that being lawful, he was not liable at all. But in the present case the defendant had no right to break up the streets at all; they employed Watson Brothers to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance, and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act "to be done." If, however, the work might have been done in a lawful manner, the employer will not be liable if it be done in an unlawful manner.[2]

Duty is imposed on employer to see work properly carried out — But where a person orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, he will be bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself from responsibility by transferring the duty to a contractor. And even an indemnity from the contractor will not save him from liability.[3] Thus in *Bower* v. *Peate*,[4] the plaintiff and the defendant were the respective owners to two adjoining houses, the plaintiff being entitled to the support, for his house, of the defendant's soil. The defendant employed a contractor to pull down his house, excavate the foundations, and rebuild the house; the contractor undertaking the risk of supporting the plaintiff's house, as far as might be necessary during the work, and to make good any damage, and satisfy any claims arising therefrom. During the progress of the work the plaintiff's house was injured, owing to the means taken by the contractor

[1] *Overton* v. *Freeman*, 11 C. B, 867. *Knight* v. *Fox*, 5 Ex, 721. *Peachey* v. *Rowland*, 22 L. J. N. S, C P, 81.

[2] *Peachey* v. *Rowland*, 22 L J, C. P., 81.

[3] *Dalton* v. *Angus*, L. R., 6 App. Cas, 740, (829). *Hole* v. *Sittingbourne Railway Co*, 6 H & N., 488. *Pickard* v. *Smith*, 10 C. B. N. S., 478. *Tarry* v *Ashton*, L. R, 1 Q B. D., 314. *Gray* v *Pullen*, 5 B. & S., 970, 32 L. J. Q B., 169. 34 L. J Q B, 265.

[4] L. R., 1 Q. B. D., 321. See also *Percival* v. *Hughes*, L. R, 9 Q B D., 441.

to support it being insufficient. It was contended for the defendant that the injury complained of had arisen from the negligence of the contractor alone, and the defendant was entitled to the benefit of the general rule that when a person employs a contractor to do a work, lawful in itself, and involving no injurious consequences to others, and damage arises to another party from the negligence of the contractor or his servant, the contractor and not the employer is liable. Lord Cockburn, C. J., with reference to the stipulations made between the defendant and the contractor, said :—" He (the defendant) directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in a position of a man who has simply authorized and contracted for the execution of a work from which, if executed with due care, no injury can arise, and who is therefore, not to be held responsible, if, while the work is going on, injury arises from the negligence of the contractor or his servants. The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." His Lordship, therefore, held the defendant liable In the case of *Lemaitre* v. *Davis*,[1] the defendant employed a contractor to do certain work which was necessary to his premises. The plaintiff was the lessee of the premises adjoining to those in which the work was carried out.

[1] L. R., 19 Ch. D., 281.

The defendant caused his premises to be pulled down without notice to the plaintiff, and in the course of this demolition, the western wall, the support of which the plaintiff had a right to, was removed, and in consequence thereof a vault in the plaintiff's premises was damaged. The contractor repaired the damage done; but the plaintiff stated that he had suffered further damage by reason of his premises having been wrongfully entered upon. Both Davis, the employer of the contractor, and the contractor were made parties defendant. Hall V. C. found that the plaintiff had a right to the support of the defendant's wall, and that the enjoyment of the right had not been *clam*, or otherwise than open, and as regards the liability of the defendant Davis, and said:—"The works were to be done by the defendant Davis in the ordinary course by a contractor; and the contract and specification, properly read, must be taken to include the works which were done, and which were not objected to as being done under them. The defendant Davis doing the work with the assistance of a contractor was doing his own works, and it was his duty to see that the works were properly done, and that certain precautions were taken, either by himself or his agent, by shoring, to prevent any injury to his neighbour's vault. Such precautions were not taken. The defendant Davis cannot shift the responsibility from himself by saying that he employed a contractor, and that it was his wrongful act. It would be a strange thing if principals should be allowed to escape from liability when altering their premises, and erecting new buildings, by saying that they employed contractors under the specifications which were drawn up for their guidance, and that the contractors only were liable for any injury which might happen. I apply the principles laid down in *Dalton* v. *Angus*[1] to the circumstances of the case, and I hold that both the defendants are liable for the injury which was done." Similarly in *Pickard* v. *Smith*,[2] the defendant employed a coal merchant to put coals into his cellar, and he was held liable for injury suffered by the plaintiff from his falling through the cellar opening which had been left open by the negligence of the coal merchant's servants. Williams J. said:—"Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants, in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work, he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities ..... That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent

[1] L. R, 6 App. Cas, 740.

[2] 10 C. B. N. S., 470. See also *Gray* v *Pullen*, 5 B. & S., 970 and *Hole* v *Sittingbourne Ry Co*, 6 H. & N., 488.

on his employer, and neglects its fulfilment, whereby an injury is occasioned. Now in the present case, the defendant employed the coal merchant to open the trap door in order to put in the coals; and he trusted him to guard it whilst open, and to close it when the coals were all put in. The act of opening it was the act of the employer, though done through the agency of the coal merchant; and the defendant, having thereby caused danger, was bound to take reasonable means to prevent mischief. The performance of this duty he omitted; and the fact of his having entrusted it to a person who neglected it, furnishes no excuse either in good sense or law."

Ground for this rule under the earlier authorities.—Under this last rule, fall cases[1] which in the earlier reports are considered to be grounded on a duty imposed on an owner of fixed property towards third persons, which duty held him liable though the injury was occasioned by the negligence of contractors or their servants, and not by the immediate servants of the owner. This rule is referred to by Littledale J., in *Laugher* v. *Pointer*,[2] as follows:—"Where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings being in the nature of nuisances for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises."

Liability of owners of carriages let to hire who select coachmen.—The old principle last referred to has been said, in *Laugher* v. *Pointer*,[2] by Littledale J., not to apply to moveables, which case illustrates the liability of owners of carriages let to hire who select and send their own coachmen; there, a gentleman, the defendant, hired from a jobman for the day a pair of horses, which were driven in his own carriage by a driver who was selected and appointed by the jobmaster; whilst making use of these horses through the negligence of the driver an accident happened to the plaintiff's horses. Littledale J., said:—"According to the rules of law every man is answerable for injuries occasioned by his own personal negligence, and he is also answerable for acts done by the negligence of those whom the law denominates *his* servants ..... and the question is, whether the coachman, by whose negligence the injury was occasioned, is to be considered a servant of the defendant?..... The rule applies not only to domestic servants who may have the care of carriages, horses and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ, or under the superintendence of

[1] *Bush* v. *Steinman*, 1 B. & P., 404 *Stone* v. *Cartwright*, 6 T. R., 411 *Sly* v. *Edgley*, 6 Esp., 1. *Littledale* v. *Lonsdale*, 2 H. Bl., 299. See Piggott on Torts, p. 92.

[2] 5 B & C, 572.

the master. As, for instance, if a man is the owner of a ship, he himself appoints the master, and he desires the master to select and appoint the crew; the crew thus become appointed by the owner, and are his servants for the management and government of the ship, and if any damage happen through their default, it is the same as if it happened through the immediate default of the owner himself. ..... This, however, is not the case of a man employing his own immediate servants ..... for the jobman was a person carrying on a distinct employment of his own, in which he furnished men, and let out horses to hire to all such persons as chose to employ him." His Lordship then referred to *Stone* v *Cartwright*,[1] *Bush* v. *Steinman*,[2] *Sly* v. *Edgley*,[3] and said; "Supposing these cases to be rightly decided, there is this material distinction, that there the injury was done upon or near, and in respect of, the property of the defendants, of which they were in possession at the time. And the rule of law may be that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises." His Lordship then held that the coachman was the servant of the jobmaster, and that therefore the defendant was not liable.[4]

Liability where the hirer of carriage selects the coachman—But if the hirer of the carriage from a job master, drives himself, or appoints the coachman and provides horses, the job master cannot be made responsible for the negligence of the coachman.[5] But on the other hand, as has been before mentioned, if the hirer interfere in any way by taking the actual management of the hired horses, or directs the hired coachman to act in a particular way, if accident happens, he will be liable.[6]

Liability under Statute of proprietor of cab and horse to third persons for negligence of cab driver—Under the provisions of the Hackney Carriage Acts, (1 & 2 Wm. IV, c 22, 6 & 7 Vic, c 86) a driver of a cab hiring a cab or horse at so much per day, keeping for himself any profit over and above the sum paid to the proprietor, is considered as a servant or agent of the proprietor with authority to enter into contracts for the employment

[1] 6 T R, 411.
[2] 1 B & P, 404
[3] 6 Esp, 6.
[4] See also the cases of *Smith* v *Lawrence*, 2 M & R, 2 *Sammell* v *Wright*, 5 Esp, 263, *Dean* v *Branthwaite*, 5 Esp 35. *Quarman* v *Burnett*, 6 M. & W, 507.
[5] *Croft* v *Alison*, 4 B. & Ald, 590
[6] *Quarman* v. *Burnett*, 6 M. & W, (499), per Parke B.

of the cab on which the proprietor is liable to the third persons suffering damage.[1] And this is so in India under Bombay Act VI of 1863.[2] But these cases do not appear to have in view the nature of the contract between the cab proprietor and the driver; in cases in which the driver is injured, the relationship between the cab-proprietor and the driver is that of bailor and bailee, and the proprietor would be liable to the driver; this was so held in *Fowler* v. *Lock*,[3] by Byles and Groves JJ., Willes J., however, considering that the relation was one of master and servant, and that therefore, in the absence of personal negligence or misconduct on his part, the proprietor was not responsible. And where the driver hires only the cab and provides the horse and harness himself, the cab proprietor has been held not to be liable to a third person suffering damage by the negligence of the driver.[4]

Common employment.—Where two or more agents are employed by the principal he will not be liable for the negligence of one of them causing injury to the others. This rule may be stated more broadly, as follows, that a master is not liable to his servant for injury received from any ordinary risk of, or incident to, the service, including acts or defaults of any other person employed in the same service,[5] but the employment need not necessarily be about the same kind of work,[6] and it makes no difference if the one agent is a foreman and the other a mere labourer; the standing or position of the agents being immaterial;[7] and a mere volunteer is in the same position as a servant.[8] The principle which exempts a master from liability to his servant for injury caused by the negligence of his fellow servant, is that the servant must be assumed to encounter the ordinary risks incident to the service at the time of entering into the contract.[9] This is shewn by the case of *Morgan* v. *Vale of Neath Railway Company*,[10] where the plaintiff was in the employment of the Railway Company, to do carpenter's work required by them on the line of railway, and the persons who caused the wrong

[1] *Powles* v. *Hider*, 6 El & Bl, 207, followed in *Venables* v. *Smith*, L R, 2 Q. B. D., 279.

[2] *Bombay Tramway Co.* v. *Khairaj Tejpall*, I. L. R., 7 Bom., 119.

[3] L R., 7 C P., 272.

[4] *King* v. *Spurr*, L R., 8 Q. B. D., 104.

[5] *Tunney* v. *Midland Ry. Co.*, L. R., 1 C. P., 291. See also the case of *Mary Anne Turner* v. *S. P. & D. Ry. Co*, cited in Alex. on Torts, p. 38.
Charles v. *Taylor*, L R., 3 C P D., 492 *Morgan* v. *Vale of Neath Ry Co.*, L. R., 1 Q. B., 149 *Lovell* v. *Howell*, 34 L. T. N. S., 183. L. R, 1 C. P. D, 161.

[7] *Feltham* v. *England*, L. R., 2 Q. B, 33 *Howell* v. *Landore Siemen's Steel Co.*, L R, 10 Q B., 62.

[8] *Potter* v *Faulkner*, 31 L. J. Q. B, 30. *Degg* v *Midland Ry. Co.*, 1 H & N., 773. *Holmes* v. *North-Eastern Ry. Co*, L. R., 4 Ex., 254. *Nicholson* v. *Lancashire and Yorkshire Ry. Co.*, 34 L. J. Ex., 84.

[9] *Lovell* v. *Howell*, L R, 1 C. P. D., 161.

[10] 5 B. & S., 736.

were porters in the employment of the same Company, engaged in shifting a locomotive engine by means of a turntable, and they allowed the engine to project so far beyond the turntable that the end of it struck against and displaced a ladder which was one of the supports of the scaffold on which the plaintiff was standing, and he fell from it to the ground and received severe injuries. The plaintiff and the porters were engaged in a common employment and doing work for a common object, *viz.*, fitting the line for traffic. Erle C. J., said:—"The principle of the cases which have established that the master is not liable to his servant for damage caused by a fellow workman is put very clearly by Blackburn J., in the course of his judgment, in the Court below. 'There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages.' I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule."[1]

Whether a common master is essential in cases of common employment.—In all cases in which the question of common employment arises, it is said to be essential that there should be a common master; and, therefore, where one of the servants is under the control of a contractor and another under the contractor's employer, the question does not arise. Thus where the White Moss Colliery Company having begun to sink a shaft in their colliery, and having fixed an engine near the mouth of the shaft, agreed with a contractor to do the sinking and excavating at a certain price per yard; the contractor being bound to find all labour, and the Company to provide and place at the disposal of the contractor the necessary engine power, ropes, &c. with an engineer to work the engine who was employed and paid by the Company, but the engine and the engineer were to be under the control of the contractor. The plaintiff, who was one of the men employed and paid by the contractor, was injured whilst working at the bottom of the shaft, through the negligence of the engineer; held, in an action brought by the plaintiff against the Company, that though the engineer remained the general servant of the Company, yet being under the orders and control of the contractor at the time of the accident, he was acting as the servant of the contractor, and not of the Company, who were therefore not liable for his negligence.[2] So where the plaintiff was a porter in the employment of the London and North-Western Railway Com-

[1] See also *Warburton* v. *G. W. Ry. Co.*, L. R., 2 Ex., 30, per Kelly C. B.

[2] *Rourke* v. *White Moss Colliery Co.*, L. R., 2 C. P., 205.

pany at Manchester Station, and the defendants, another Railway Company, used that station, and their servants whilst within the station were subject to the rules of the London and North-Western Railway Company, and to the control of their Station Master The plaintiff whilst engaged in his usual employment in the station was injured by the negligence of the defendant's engine driver in shunting a train, it was held that the plaintiff and the defendant's engine driver were not fellow servants, and that the defendants were liable[1] So again where there were two stations at Leeds the one belonging to the Great Northern Railway Company, and the other to the North-Eastern Railway Company, (the defendant Company;) these stations abutted on one another, and were approached by parallel lines of rails, the entrance and exits from the stations being governed by signals and points worked by signalmen, one of whom was the plaintiff; the duty of such signal-men being common to both stations; one Swainson was paid and engaged by the Great Northern Railway Company, and wore their uniform, but his duty was to attend to the defendant's goods trains as well as those of the Great Northern Railway Company An engine of the defendant's was upon the lines of the Great Northern Railway Company, and Swainson signalled to the engine-driver to go on to the defendant's lines; the driver obeyed and having reversed the engine, negligently ran over and killed Swainson, who was then looking at a train coming in another direction; it was held in the Court of Appeal that Swainson and the driver of the engine were not engaged in a common employment, and that the defendant Company were bound to compensate Swainson's widow.[2] The authorities, however, on this subject do not appear to be easily reconcilable. Thus in *Johnson* v *Lindsay*,[3] where an action was brought by a workman in the employment of Messrs Higgs and Hill, contractors, who were engaged in erecting a block of artizan's dwellings, againts Messrs Lindsay, who were sub-contractors under them for making a fire-proof floor, to recover damages for an injury sustained through the negligence of a workman in the service of Messrs Lindsay. The jury found a verdict for the plaintiff, which verdict the defendants applied to the Divisional Court to set aside; Lopes L J and Cotton L J, were of opinion that the defendants became sub-contractors under Higgs and Hill, and were, together with the men directly employed by them, "in the employment and under the general control of Higgs and Hill, working together for one common object, namely, the carrying out of Higgs and Hill's contract, and taking upon themselves all the risks naturally incident to the work which they had undertaken And that therefore Higgs and Hill were the common masters of the injuring and the injured man, and the case therefore

[1] *Warburton* v. *G W. Ry Co*, L R, 2 Ex, 30

[2] *Swainson* v *North Eastern Ry Co*, L R, 3 Ex D, 341

[3] W N. Eng, (1889), 169, L R, 23 Q B D, 508.

fell within the principle of *Wiggett* v. *Fox*,[1] and their Lordships held that as there was a common employment, and a common master the defendants were not liable. Lord Justice Fry, however, was of a different opinion, considering that the defendants were not sub-contractors to Higgs and Hill, but were independent contractors for their part of the work, and was further of opinion that even supposing they were sub-contractors, the question arose, whether Higgs and Hill were responsible for any control over the work and the workmen; there being no evidence that such was the case, he was of opinion that the defendants were alone responsible for their part of the work. He further added that the authorities[2] were not easily reconcilable, but considered that they established the principle that the control of the principal employer over the work and the men was the test to apply in ascertaining whether the master was liable or not. And was of opinion that there was a common employment but no common master, and that whether the defendants were sub-contractors or independent contractors, there was no ground for the exemption of his master. The appeal was therefore dismissed. This case appears to be the first case in which the doctrine of common employment has been applied to a sub-contractor, in all other reported cases the defendant having been the principal contractor.

Breach of Statutory duty by Corporation.—Whenever an Act imposes upon any public body the duty of maintaining or repairing a highway, or any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such public body,[3] unless there are provisions in the Act creating such public body limiting their liability,[4] or the duty of repairing is not absolute.[5] The rule being that in the absence of something to show a contrary intention, the legislature intends that the body, the creature of the Act, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things.[6] This rule has been applied by the Court of Appeal in the case of the *Corporation of the Town of Calcutta* v. *Anderson*.[7]

Liability of managing owner for captain's negligence.—A managing owner is liable to third parties for the negligence of the captain who is trad-

[1] L. R., 11 Ex, 832.

[2] *Wiggett* v. *Fox*, L. R., 11 Ex., 832, as explained by *Abraham* v. *Reynolds*, 5 H. & N., 143. *Rourke* v. *White Moss Colliery Co.*, L. R, 2 C. P. D., 205. *Swainson* v. *N. E. Ry. Co.*, L. R., 3 Ex. D., 341.

[3] *Gibbs* v. *Trustees of Liverpool Docks*, L. R., 1 App. Cas., 93.

[4] *Young* v. *Davis*, 31 L. J. Ex., 256.

[5] *Wilson* v. *Mayor of Halifax*, L. R., 3 Ex., 114.

[6] *Gibbs* v. *Trustees of Liverpool Docks*, L. R., 1 App. Cas., 110, per Blackburn J. Addison on Torts, 740.

[7] 1. L. R., 10 Calc., 445.

ing independently and rendering a share of the profits to the owner.[1] So where a steamer while on a voyage from Marseilles to London fell in with the "Sardis" which had been disabled by an accident to her machinery, and the master of the Thetis agreed to tow the Sardis to port, and in endeavouring to do so, negligently came into collision with the Sardis and sank her, held that the master was acting within the scope of his authority, and that the owners of the Thetis were therefore liable for the damage.[2] But where the master of a merchant ship appoints his officers and crew he will himself be usually held liable to third persons for all acts of negligence or mis-feasance on the part of the officers or crew by which the cargo or the property of others is damaged;[3] but not for trespass committed wilfully by his crew.[4]

Liability of owner and master of ships for pilot's negligence.—The owner and master of a ship are, in the absence of contributory negligence on the part of the master or crew, exempted from all liability for loss or damage occasioned by the fault or incapacity of any qualified pilot, who has charge of the ship within any district where the employment of a pilot is compulsory;[5] and it has been held that he is exempt where the master is authorized to employ a pilot and elects to do so.[6] But in cases, where, though the pilotage is compulsory, the control of the navigation of a vessel is not vested in the pilot, but remains solely with the master of the ship, the pilot being merely the adviser of the master, the owner of the ship will not be freed from liability.[7] As to the limitation of liability of owners of British and Foreign vessels, see 25 and 26 Vic. c. 63, s. 54 Where the employment of a pilot is compulsory on board a vessel, and, such pilot being on board, an accident happens through negligence in the management of the vessel, it lies upon the owners, in order to exempt themselves from liability, to show that the negligence causing the accident was that of the pilot. If such negligence is partly that of the master or crew, and partly that of the pilot, the owners are not exempted from liability. But if it be proved on the part of the owners that the pilot was in fault, and there is no sufficient proof that the master or crew were also in fault in any particular which contributed, or may have contributed, to the accident, the owners will have relieved themselves of the burden of proof which the law casts

[1] *Steel* v *Lester*, L R, 3 C. P. D., 121.

[2] *The Thetis*, L. R, 3 Adm., 365.

[3] Maude and Pollock on Shipping, 154.

[4] *Bowcher* v *Nordstrom*, 1 Taunt., 568. *Sutherland* v *Shaw*, Bourke, (A C J), 92, 144.

[5] 17 & 18 Vic., c. 104, s 388. *The General Steam Navigation Co.* v. *British and Colonial Steam Navigation Co*, L R, 4 Ex., 238. *The Thames Conservators* v. *Hall*, L R., 3 C. P., 415. *The Hibernian*, L. R., 4 P. C., 511.

[6] *The Hanover*, Bourke, (V. A. J), 15.

[7] *The Guy Mannering*, L. R., 7 P. D., 52. On appeal L R., 7 P. D., 132, 51 L. J P., 17. Newson's Dig on Shipping, 174.

upon them.[1] And, similarly, it has been held that a pilot employed under the compulsory clauses of the Merchant Shipping Act, 1854, does not undertake the risk of damage by negligence of the crew as incident to his employment.[2]

Liability for agent's wilful and malicious acts.—This liability again depends upon whether or no the act is done in the course of the master's employment.[3] If the act is done by the agent within the scope of his employment, the principal will be liable;[4] if done outside the scope of his employment, the principal will not be liable.[5]

Liability of principal for direction given by his agent to sheriff to seize goods of the wrong person.—The principal is also liable for an erroneous endorsement on a writ made by his solicitor and delivered to the sheriff whereby the goods of a person other than the judgment-debtor are seized. Thus in *Morris* v. *Salberg*,[6] the defendant had recovered judgment in an action on bills of exchange against the plaintiff's son G. M. Morris. And a writ directing the sheriff to levy the amount of the judgment upon the goods of G. M. Morris was taken out by the defendant's solicitor, who endorsed the writ, "Levy 170£ 16*s.* 11*d.* on the goods of the defendant; the defendant is a gentleman who resides at Sarnau Park, Cardigan, South Wales, in your bailwick." The address so given was the residence of the plaintiff G. Morris, not of his son, who resided elsewhere. The sheriff entered on the premises so described and seized goods of the plaintiff. The plaintiff therefore sued the defendant for trespass and wrongful seizure. It was admitted at the trial by the defendant's Counsel that if a subsequent ratification by the defendant of the act of the sheriff was possible in law, circumstances existed which amounted to such ratification, but he contended that there could be no ratification as the sheriff was not the defendant's agent. Stephen J., on the authority of *Childers* v. *Wooler*,[7] gave judgment for the defendant. Lord Esher M. R., on appeal said:—"The question for the Court was, whether the endorsement on the writ was a direction to the sheriff or not ..... We have in this case something endorsed on the writ by the defendant's solicitor, by whose action in making such endorsement the defendant is bound; and even if it was not meant to be a direction to seize the goods seized, yet I think if it was in such a form as to mislead the sheriff into thinking that it was, the result would be the same; for

[1] *Muhammad Yusuf* v. *P. and O. Steam Navigation Co.*, 6 Bom. H. C., 98.

[2] *Smith* v. *Steele*, L. R., 10 Q. B., 125.

[3] *Croft* v. *Alison*, 4 B. & Ald., 590. *Gunga Gobind Singh* v. *Peeroo Munjee*, S. D. A., (1853), Bengal, 339.

[4] *Hussey* v. *Field*, 2 C. M. & R., 432.

[5] *Bowcher* v. *Noidstrom*, 1 Taunt., 568.

[6] L. R., 22 Q. B. D., 614.

[7] 2 El. & El., 287.

if a person makes a statement that may well mislead, and does in fact mislead the sheriff into thinking that he was directed to seize the goods seized, it seems to me that such a statement renders the maker of it liable as if he had intended to give such a direction." His Lordship referred to the cases of *Bowles* v. *Senior*[1] *Jarmain* v. *Hooper*[2] and *Childers* v. *Wooler*,[3] and said that in *Jarmain* v. *Hooper*, the conclusion at which the Court arrived really amounted to a decision that such an endorsement might be equivalent to a direction to the sheriff, and might constitute the sheriff the bailiff of the execution creditor and that, though it be given not by the execution creditor himself but by his attorney, the execution creditor would be liable. With reference to the question of ratification, his Lordship said:—"If there cannot be such a ratification in law, then the distinction taken by the majority of the Court in *Childers* v. *Wooler*[3] with regard to *Jarmain* v. *Hooper*,[2] on the ground that that case proceeded on ratification, must necessarily fall to the ground. In that case the two decisions would be in conflict; and the question would be which way are we to decide ... ... If one of the two cases has to be overruled, I think we have the authority of the Court of Appeal[4] for saying that it would be *Childers* v. *Wooler*, not *Jarmain* v. *Hooper*. If *Jarmain* v. *Hooper* is not overruled, it seems to me in point,' and Lindley L J., says in giving judgment in *Smith* v. *Keal* with regard to *Jarmain* v. *Hooper*, 'I have often had occasion to consider that case and I do not think it has been shaken by any subsequent decisions. Whatever objections to it may have been felt by some Judges, it has been taken as good law, and has been constantly acted upon.' The Court of Appeal in *Smith* v. *Keal* took the distinction that in the case before them the direction was not by endorsement in writing on the writ, but by word of mouth after delivery of the writ. They do not say that such a direction by word of mouth, if given by the execution creditor himself, would not have rendered him liable, but they say that the execution creditor's solicitor can only bind him by a direction given in writing on the writ, and therefore that the defendant was not liable in respect of the direction given verbally by his solicitor's clerk. In the present case there was an endorsement on the writ which was evidence for the jury on the question which was put to them, and they answered that question in the affirmative. I think their finding brings the case within *Jarmain* v. *Hooper*, and that the learned Judge ought to have given judgment accordingly. The appeal must be allowed and judgment entered for the plaintiff." "Fry L J., said:—"In my opinion the defendant's Counsel was right in saying that, if a direction was given no ratification would be necessary, but if no direction were given, then, as the sheriff in seizing the goods acted as the servant of the Court or of the Queen, not of the execution creditor, there could be no ratification by the execution

[1] 8 Q B, 677.
[2] 6 M & G, 827.
[3] 2 El. & El., 287.
[4] *Smith* v. *Keal*, L. R., 3 Q B. D., 340

creditor But if this be the correct view, it certainly undermines the authority of the case of *Childers* v *Wooler*, and shews that the distinction taken there was untenable But whether this case is looked at with reference to the decision in *Jarmain* v *Hooper*,[1] or with reference to that in *Childers* v *Wooler*,[2] the result seems to be the same If *Jarmain* v *Hooper* be correct, then the endorsement on the writ was a sufficient direction to the sheriff to make the execution creditor liable for his act in seizing the goods, and the case will be governed by that decision If on the other hand *Childers* v *Wooler* be right, it follows that subsequent circumstances shewing a ratification would be admissible to fix the defendant with liability . The true view appears to me to be that the previous direction of the execution creditor may make the sheriff his servant for the purpose of seizing the goods, and an endorsement on the writ may amount to such a direction, and it is a question of fact whether in the particular case it does so"

For mistake in excess of authority—The master is liable to third persons for wrongs done in his master's business by the servant in mistake or excess of the lawful authority given to him —But, as says Mr Pollock in his work on Torts,[3] to establish a right of action against the master it must be shewn (*a*) that the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do, (*b*) that the act, if done in a proper manner, or under circumstances erroneously supposed by the servant to exist, would have been lawful ' There appears here (as will be pointed out) to be a distinction between the cases in which the agent is entrusted with the general conduct of his master's business and cases where the agent has been appointed to a special sphere of duty Thus in the latter class of cases where a station master gave the plaintiff into custody, on account of the plaintiff refusing to pay for the carriage of a horse on the defendant Company's line, until the station master by telegraph ascertained that a pass or certificate produced by the plaintiff was in order, Blackburn J, said "The only question is, whether there was evidence that the station master was clothed with authority; that his act, in detaining the plaintiff in custody, was within the scope of his authority, and was such as that the evidence before the jury would properly convince them that he was authorized on the part of the Company to do the wrongful act and consequently that the Company were responsible There can be no question since the decision of the case of *Goff* v *Great Northern Railway Company*[4] that when a Railway Company or any other body (for it does not matter whether it is a Railway Company or not) have upon the spot a person acting as their agent, that is evidence to go to the jury that that person has authority from them to do all those things on their behalf which are right and proper in the

[1] 6 M & G, 827
[2] 2 El & El., 287.
[3] p 76.
[4] 30 L. J. Q. B., 148; 3 El. & El., 672.

exigencies of their business; all such things as somebody must make up his mind on behalf of the Company whether they should be done or not, and the fact that the Company are absent, and the person is there to manage their affairs is *primâ facie* evidence that he was clothed with authority to do all that was right and proper; and if he happens to make a mistake, or commits an excess, while acting within the scope of his authority his employers are responsible for it."[1] And where a foreman porter under the impression that the plaintiff was stealing timber belonging to the Company gave him into custody on that charge, and the plaintiff was acquitted and sued the Company for assault and false imprisonment, the Court held that the Company were responsible. Montague Smith J., said:—"No doubt if, in furtherance of the particular business of the Company, it is necessary to arrest a person, the servants of the Company have an implied authority to do it, thus, if there is a bye-law of the Company, and power to arrest any person infringing it, it must be presumed that the Company give authority to any one they put in charge of the station so to enforce it, since this can only be done by the Company's servants on the spot. Here, however, the cause of the arrest was not at all connected with the Company's business, and it cannot, I think, be presumed that the Company give authority to their servants generally to apprehend any person whom the servants think is committing a felony, even though on the Company's property."[2]

In none of the above cases did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agent had been appointed to a special sphere of duty; and the result of those decisions is, that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer, unless he had power to apprehend offenders promptly on the spot.[3] But where the question of the authority of the manager or agent entrusted with the general conduct of his master's business arises, the test is, has he a general authority to do the act complained of, or a particular authority to act in cases of an emergency Thus in the *Bank of New South Wales* v. *Owston*,[3] it has been held that the arrest and the prosecution of offenders, is not within the ordinary routine of banking business, and therefore not within the ordinary scope of a bank manager's authority Evidence accordingly is required to show that such arrest or prosecution is within the scope of the duties and class of acts such manager is authorized to perform. That authority may be general, or

[1] *Poulton* v *London and S W Ry Co.*, L. R., 2 Q. B., 534 See also as to cases under this class, *Eastern Counties Ry Co* v *Broom*, 6 Ex., 314 *Moore* v *Metropolitan Ry Co*, L. R., 8 Q. B., 36 *Allen* v *London and N W Ry Co.*, L. R., 6 Q. B., 65

[2] *Edwards* v. *London and N W Ry Co*, L. R., 5 C P., 445

[3] *Bank of New South Wales* v. *Owston*, L. R., 4 App. Cas., 270, (288).

it may be special and derived from the exigency of the particular occasion on which it is exercised. And in the former case it will be enough to show commonly that the agent was acting in what he did on behalf of the principal; but in the latter case evidence should be given of a state of facts which shews that such exigency is present, or from which it might reasonably be supposed to be present.[1] In a case in which it was sought to make a Railway Company liable in damages for an alleged defamation of a passenger by one of the Company's guards, the Court held that the alleged defamatory statement was a statement merely amounting to a mere expression of suspicion that the passenger had travelled without a ticket, and that it was doubtful whether a suit would lie at all even against the guard, but that it would certainly not lie against the Company. Wilkinson J., as to this said :—" Undoubtedly the Railway Company is responsible for the manner in which their servants do any act which is within the scope of their authority, and is answerable for any tortious acts of their servants, provided that such act is not done from any caprice of the servant, but in the course of his employment. But it would be straining this principle of law to an unprecedented extent to hold that, because the guard of a train in the execution of his duty expressed a suspicion not altogether unfounded, that a passenger was travelling with a wrong ticket, the Company was liable in damages to that passenger for slander.[2]

Liability of common carrier.—The Common law of England regulating the responsibility of Common Carriers is in force in this country, and is not affected by the provisions of the Contract Act. He is therefore liable for all losses of goods entrusted to him for carriage, except those occasioned by the act of God or the Queen's enemies.[3] The law implies that he contracts to ensure the safe delivery of goods entrusted to him. He may, however, in this country limit his liability by conforming to the provision of section 10 of the Railway Act of 1879, or to the provision of s. 6 of the Carriers Act of 1865. The Bombay High Court in *Kuverji Tulsidas* v. *G. I. P. Railway Company*,[4] have held that the Common law rule whereby common carriers are held liable as insurers of goods against all risk except the act of God or the King's enemies is not now in force in India; but this decision has been dissented from by a Full Bench of the Calcutta High Court in the case above cited.[3] The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole, direct and irresistible cause of the loss he is discharged. In order to show that the cause of the loss

[1] *Bank of New South Wales* v. *Owston*, L. R., 4 App. Cas., 270, (288).

[2] *South Indian Ry. Co.* v. *Ramkrishna*, I. L. R , 13 Mad., 34.

[3] *Mothoora Kant Shaw* v. *India General Steam Navigation Co.*, I. L. R., 10 Calc., 166.

[4] I. L. R., 3 Bom., 109.

was irresistible, it is not, however, necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precautions under the circumstance could it have been prevented.[1] It must, however, be remembered that there are certain carriers who are not common carriers, *e. g*, a shipowner, and who would not be therefore subject to the liability of a common carrier, that is to say, he does not insure goods bailed to him for carriage.[1] Such carriers may, however, and generally do limit their liability under their bill of lading. The distinction drawn between common carriers and such carriers as I have last mentioned is referred to by Cockburn C. J., in *Nugent* v. *Smith*: "I ..... find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship. Parsons a writer of considerable authority on this subject, defines a common carrier to be 'one who offers to carry goods for any person between certain termini and on a certain route. He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage. If either of these elements is wanting, we say the carrier is not a common carrier either by land or water If we are right in this, no vessel will be a common carrier that does not ply regularly,- alone or in connection with others, on some definite route, or between two certain termini.' Thus a dâk carriage proprietor has been held not to be a common carrier;[2] so also the proprietors of the Government Bullock train.[3] So also a Foreign Steam Ship Company,[4] so also the British India Steam Navigation Company.[5] But the Great Eastern Peninsula Railway Company have been so held.[6] The liability of carriers whether common carriers or others appertain rather more to the subject of bailments than to that of Principal and Agent, and I do not propose to pursue their different liabilities. The cases cited will

[1] *Nugent* v. *Smith*, L. R., 1 C. P. D., 423 But see *Pandorf* v *Hamilton*, L. R., 16 Q. B. D., (633), where Lopes J., has stated the broad principal that "a carrier by sea is, like a common carrier, apart from express contract, absolutely responsible for the goods entrusted to him, and insures them against all contingencies excepting only the act of God and the enemies of the Queen," and in this statement of the Common law Lord Chief Justice Bowen and Lord Chief Justice Fry concur. See L. R., 17 Q. B. D., (683). See also an article on the Liability of Shipowners at Common Law, Vol V, Law Quarterly Review, p. 15.

[2] *Todal Singh* v. *Thompson*, 2 All. H. C., 237.

[3] *Postmaster of Bareilly* v. *Earle*, 3 All. H. C., 195.

[4] *Mackillican* v. *Compagnie des Messageries Maritime de France*, I. L. R., 6 Calc., 227.

[5] *Jellicoe* v. *British India Steam Navigation Co.*, I. L. R., 10 Calc., 489.

[6] *Surutram Bhaya* v. *G. I. P. Ry. Co.*, I. L. R., 3 Bom., 96. *Ishwardas Gulabchand* v. *G. I. P. Ry. Co.*, I. L. R., 3 Bom., 120. See also the remarks of Garth C. J., in *Mohoora Kunt Shaw* v. *India General Steam Navigation Co.*, I. L. R., 10 Calc., (187).

show the claims made against such carriers, and will also point out the different ways in which they can limit their liabilities.[1] As to this latter point, and as to the degree of care which is required to protect them from liability in respect of a loss arising from the act of God see *Nugent* v. *Smith*.[2]

Qualifications of the principal's liability. Contributory negligence.—Although a third person may in the cases referred to be able to recover against the principal for the negligence of the agent; yet he cannot do so if his own negligence has contributed to the accident. But yet it is not every negligence on the part of the plaintiff which in any degree contributes to the mischief which will bar him of his remedy, but only such negligence that the defendant could not by the exercise of ordinary care have avoided the result.[3] The effect on the suit of the plaintiff's negligence in causing the wrong is given in *Davey* v. *London and S. W. Ry. Co.*,[4] *Fordham* v. *Brighton Ry. Co.*,[5] *Thorwood* v. *Bryan*[6]; and *Weller* v. *London Brighton and South Coast Ry.*,[7] as to a vessel. *The Bernina*,[8] *Tuff* v. *Warman*;[9] as to the *onus* of proof with regard to contributory negligence, see *Wakelin* v *London and S W. Ry Co.*[10]

Distinction between doctrine of contributory negligence and volenti non fit injuria.—Contributory negligence arises where there has been a breach of duty on the defendant's part, not where ex-hypothesi there has been none. It rests upon the view that though the defendant has in fact been negligent, yet the plaintiff has by his own carelessness severed the casual connection between the defendant's negligence and the accident which has occurred; and that the defendant's negligence accordingly is not the true proximate cause of the injury. It was for this reason that under the old English form of pleading, the defence of contributory negligence was raised, in actions based on negligence, under the plea of "not guilty." It was said in *Weblin* v. *Ballard*,[11] that in an inquiry whether the plaintiff had been guilty of contributory negligence, the plaintiff's knowledge may have even led him to exercise extraordinary care. But the doctrine of *volenti non fit injuria* stands outside the defence of contributory negligence, and is in no way limited by it. In individual instances the two ideas sometimes seem to cover the

[1] See also *Moheshwar Das* v. *Carter*, I. L. R., 10 Calc., 210, and *Hassanbhoy Visram* v. *B. I S. N. Co*, I. L R., 13 Bom., 571.

[2] L R., 1 C. P. D, 436.

[3] *Radley* v. *L. & N. W. Ry. Co.*, L. R., 1 App. Cas., 754.

[4] L. R., 12 Q. D., 70.

[5] L. R., 3 C. P., 368.

[6] 8 C. B, 115.

[7] L. R., 9 C. P., 126.

[8] L. R., 11 P. D., 31

[9] 5 C. B. N. S., 573, and the cases collected in Evan's on Pr. & Ag., p. 579.

[10] L. R., 12 App. Cas., 41.

[11] L. R., 17 Q. B. D., 122.

same ground, but carelessness is not the same thing as intelligent choice, and the Latin maxim often applies where there has been no carelessness at all. A confusion of ideas has frequently been created in accident cases by an assumption that negligence to the many who are ignorant may be properly treated as negligence as regards the one individual who knows and runs the risk, and by dealing with the case as if it turned only on a subsequent investigation into contributory negligence. In many instances it is immaterial to distinguish between the two defences, but the importance of the distinction has been pointed out by Earle J., in his summing up to the jury in *Indermaur* v. *Dames*,[1] and by Cockburn C. J., in *Woodley* v. *Metropolitan District Ry. Co.*[2] These two defences, that which rests on the doctrine *volenti non fit injuria*, and that which is popularly described as contributory negligence are therefore quite different.[3] In a late case, Lord Bramwell has held that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim *volenti non fit injuria* applies, but the question whether this is so or not was distinctly left open by other of the learned Judges in that case.[4] In England this liability of the principal for his servant's negligence, is governed by the Employers Liability Act of 1880, 42 & 44 Vic., c. 42; and in decisions under that Act, it has been held that the maxim *volenti non fit injuria* has no application where the injury arises from the breach of a statutory duty on the part of the employer.[5]

Vis Major. "Act of God" as applied to carrier exceptions.—A further qualification of the third person's right against the principal, is when the act occasioning the injury is the act of God, or in other words can be classed under the head of *Vis major*. The definition of what amounts to an act of God has been laid down in *Nugent* v. *Smith*,[6] there Cockburn C. J., says at p. 434. "The definition which is given by Mr. Justice Brett of what is termed in our law, the "act of God" is, that it must be such a direct, and violent, and sudden, irresistible act of nature, as could not by any amount of ability have been foreseen, or if foreseen could not by any amount of human care and skill have been resisted. ..... The exposition here given appears to me too wide as regards the degree of care required of the shipowner, and as exacting more than can be properly expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of

[1] L. R., 1 C. P., 277.
[2] L. R., 2 Ex. D., 384.
[3] *Thomas* v. *Quartermain*, per Bowen L. J., L. R., Q. B. D., (697).
[4] *Membery* v. *G. W. Ry. Co.*, L. R., 14 App. Cas., 179.
[5] *Baddeley* v. *Earl Granville*, L. R., 19 Q. B. D., 423.
[6] L. R., 1 C. P. D., (434).

care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligible rule. That a storm at sea is included in the term "act of God" can admit of no doubt whatever. Storm and tempest have always been mentioned in dealing with this subject as among the instances of *vis major* coming under the denomination of "act of God;" but it is equally true, ... that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and Continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the *vis major*, and the degree of diligence which he is bound to apply to that end. It is at once obvious, as was pointed out by Lord Mansfield in *Forward* v. *Pittard*,[1] that all causes of inevitable accident—*casus fortuitus*—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in whole or in part in the agency of man, whether in acts of commission or omission, of non-feasance or of mis-feasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God," to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable. On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the "act of God," that it naturally follows that the carrier is entitled to immunity. The rain which fertilises the earth, the wind which enables the ship to navigate the ocean are as much within the term act of God, as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here, another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided, or if by his rashness he unnecessarily encounters

[1] 1 T. R., 27.

it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception" As to damage done by "natural forces," see *Bailiffs of Romney Marsh* v. *Trinity House*.[1]

But an act of God does not necessarily exempt from every kind of liability—This exemption under the heading act of God is not always applicable, as for instance, where a person enters into a contract to be liable for damages under particular circumstances, or an Act of Parliament imposes a liability for damages occasioned by particular circumstances, in such cases it is no defence.[2]

Accidental injury—Accidental injury, or inevitable accident, also fall under the head of *vis major*, and will exempt from liability where a person is doing a lawful act and unintentionally causes damage.[3]

Liability of Secretary of State for negligence and other torts of public servant.—The Secretary of State for India in Council is liable for damage occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable.[4] Thus in the case of the *P and O. Company* v. *Secretary of State*,[4] before referred to, which was a suit brought by the plaintiffs for damage done to one of their horses through the negligence of some men employed at one of the Government dockyards, which dockyard was carried on by the Government in the same way, and for the same purposes, as any private firm or Company might have carried on a similar business. Sir Barnes Peacock decided that the Government of India were responsible to the plaintiffs upon the ground that the negligence complained of was an act done by their servants in carrying on the ordinary business of ship-builders, unconnected altogether with the exercise of Sovereign powers, and which any firm or individual might have carried on for the same purpose. It being held that the East India Company would have been liable in such a case before 21 and 22 Vic c 106 was passed, and that the Government of India were equally liable after the Act came into operation It is remarked in this case that there is a clear distinction between acts done in the exercise of what are usually termed Sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them, and it has been remarked by Peacock C. J., that where an act is done or a contract entered into it in the

[1] L R, 5 Ex, 204, L R., 7 Ex., 247.

[2] *River Wear Commissioners* v *Adamson*, 26 W R, (Eng), 217, L R, 2 App. Cas 743 *Paraline* v. *Jones*, 4 T R, 660

[3] *Holmes* v *Mather*, L R, 10 Ex, 261 *Hammack* v. *White*, 11 C B N S, 588

[4] *Peninsular and Oriental Steam Navigation Co.* v. *Secretary of State*, 5 Bom H. C. App, 1, Bourke Rep., Pt. VII, 167.

exercise of powers usually called Sovereign powers, by which is meant powers which cannot be lawfully exercised except by a Sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie.[1] This latter principle was followed in *Nobin Chunder Dey* v *Secretary of State for India*,[2] where the plaintiff sued the Secretary of State to establish his claim to obtain licenses to sell excisable liquors, on the ground that he was the highest bidder at the sale held by the Collector for the right to sell such liquors; the Court holding, that the suit was not maintainable, being in respect of acts done by Government in the exercise of Sovereign powers. The Madras Court have, however, held that the principle was wrongly stated in that case, and have dissented from it,[3] and the case has also been questioned by the High Court of Allahabad.[4] In the Madras case it was held by the Court of Appeal that the act of State which the Municipal Courts of British India are debarred from taking cognizance of, are acts done in the exercise of Sovereign powers, which do not profess to be justified by Municipal law. There the plaintiff had shipped salt from Bombay to the Malabar Ports, having conformed to the provisions of the Bombay Salt Act of 1873, and having paid the full duty leviable under the Indian Tariff Act of 1875. By notification under that Act, the Governor-General in Council had exempted salt which had paid the excise duty at Bombay from liability to pay more than the difference between what was so paid, and the import duty leviable under the Tariff Act. Whilst the salt was in transit, the Salt Act of 1877, which raised the duty, came into force; and the Collector of Malabar levied 11 annas a maund on the salt imported, in the belief that he was so authorized to act by law, and his action was ratified by Government. It was there admitted that the Secretary of State would be liable in a case in which the East India Company, would have been liable, but it was contended that the East India Company would not have been liable to have been sued in a case like the one before the Court, but only in cases in which a petition of right would lie to the Crown, and in certain other cases in which they had entered into contractual engagements of a *quasi* private character. Mr. Justice Turner held that the suit was one either for restitution of the sum wrongfully seized and held, or for damages for the wrongful taking, and was therefore in its nature apparently a claim for which a petition of right would lie as between the subject and the Sovereign; and after stating that the question did not wholly depend on the nature of the relief prayed, but also on the question as to whether the person who committed the tortious act, was, in such a position relatively to the Crown that the Crown,

[1] *P and O. Steam Navigation Co.* v *Secretary of State*, Bourke, Pt. VII. 167.

[2] I. L. R., 1 Calc., 11

[3] *Hari Bhanji* v. *Secretary of State*, I. L. R., 4 Mad., 344; on appeal, I. L. R., 5 Mad., 273.

[4] *Kishen Chand* v. *Secretary of State*, I. L. R., 3 All., 829 (835.)

or the Secretary of State, could be made responsible through him; held, that although there was no provision of law rendering Custom House officers in express terms amenable to the law for acts done in their official capacity, they were nevertheless liable under the principles which had become vested in the law by the earlier legislation, whereby the Supreme Government submitted to have questions as to rights in dispute between its officers of revenue and its subjects determined in its own Courts; and that the suit would therefore lie against the Customs officers, and as his act had been ratified by the Government the Government was liable to be sued for damages for the wrongful act.

Non-liability for acts done in the exercise of Sovereign powers which do not profess to be justified by Municipal law.—On appeal[1] in the case last mentioned Sir Charles Turner C. J. and Mr. Justice Muttasami Ayyar upheld the judgment of the lower Court and held that the act of State of which the Municipal Courts of British India are debarred from taking cognizance, were acts done in the exercise of Sovereign powers which do not profess to be justified by Municipal law;—His Lordship the Chief Justice in delivering judgment said with reference to the case of *Nobin Chunder Dey* v. *Secretary of State*, "With the hesitation suggested by the respect due to the learned Judges by whom the case of *Nobin Chunder Dey* was decided, we are unable to acquiesce in the propriety of the decision. Two principal rules regulate the maintenance of proceedings at law by a subject against a Sovereign, the one having relation to the personal status of the defendant, the other to the character of the act in respect of which relief is sought. ..... The East India Company was not a Sovereign, and the personal exemption from suit which is the attribute of sovereignty did not attach to it. *Nabob of the Carnatic* v. *E. I. Company*,[2] *Bank of Bengal* v. *E. I. Company*,[3] *P. and O. Steam Navigation Company* v. *Secretary of State*,[4] ..... and this is further shown by the circumstance that the Company was held liable for the negligence or misconduct of its officers in cases in which the sovereign would not have been held liable even on a petition of right ..... The second rule to which we have referred as having relation to the nature of the act complained of, is the rule that Municipal Courts have no jurisdiction to entertain claims against the Government arising out of acts of State. What is the sense in which the term "act of State" is to be understood in this rule? In one sense all acts done by the officers of the Government in the exercise of powers conferred on them for purposes of administration and which cannot legally be done

[1] *Secretary of State* v. *Hari Bhanji*, I. L. R., 5 Mad., 273.

[2] 1 Ves. Jun, 370: 2 Ves. Jun., 56.

[3] Bignell's Calc. Rep., cited in Bourke, Pt. VII, 180.

[4] Bourke, Pt. VII, 166—198

by private persons may be termed acts of State. There are cases in which it has been held that the East India Company was answerable to the Municipal Courts on the ground that the acts complained of were committed in the conduct of undertakings which might be carried on by private persons. The *Peninsula and Oriental Steam Navigation Company* v. *Secretary of State*.[1] In those cases it was not necessary to do more than to call attention to the general distinction between acts done in the exercise of powers usually termed Sovereign powers, and acts done in the conduct of undertakings which might be carried on by persons who enjoyed no delegated powers of sovereignty. In the conduct of the commercial operation of the Company the occurrence of actionable wrongs could hardly be altogether avoided, and it was obvious that no character of sovereignty attached to such operations. But the decision in the case of *Nobin Chunder Dey* goes beyond the decisions to which we have referred. It is apparent that the learned Judges had in view the able judgment in the *P. and O. Steam Navigation Company* v. *Secretary of State;* but whereas in that case after noticing the distinction above mentioned, the Court held that exemption from suit could not be claimed in respect of the latter class of acts, and expressed no opinion that all acts of the former class would enjoy such immunity, in *Nobin Chunder Dey's case* it has been ruled that the liability of the Government or its officers to suit is restricted to acts of the former class. It appears to us that this position cannot be maintained, and that the decided cases show that in the class of acts which are competent to the Government and not to any private person, a distinction taken is between those which lie outside the province of Municipal law, and those which fall within the law, and that it is the former only that in this country the Municipal Courts in British India cannot take cognizance. Acts done by the Government in the exercise of the Sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of Municipal law, and although in the administration of domestic affairs the Government ordinarily exercise powers which are regulated by the law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify them by any canon of Municipal law. For the exercise of these powers the Government, though irresponsible to the Courts, is not wholly without responsibility. Under the constitution of England it is more or less responsible to Parliament through the responsible ministers of the Crown. Acts done in the exercise of Sovereign powers, but which do not profess to be justified by Municipal law, are what we understand to be the acts of State of which Municipal Courts are not authorized to take cognizance." There is no distinction as to the liability of the Secretary of State between a liability under contract and a liability arising

[1] Bourke, Pt. VII, 166—188.

out of a wrongful act.[2] The liability of Government in the case of a ratification of a wrongful act of its officer, has been recognized in the case of the *Collector of Masulipatam* v. *Cavaly Vencata Narayanappa*.[3]

[2] *P. & O. St. Nav. Co.* v. *Secretary of State*, 5 Bom. H. C. App., (15).

[3] 8 Moo I A., 529.

LECTURE XII.—(*Continued.*)

PART III.—LIABILITY OF PRINCIPAL FOR AGENT'S FRAUD AND MIS-REPRESENTATIONS.

Liability for fraud and misrepresentation—Must be in the course of master's business and for benefit of master—Liability for fraud even though unauthorized—Same principles applicable to corporations—Principal not liable where agent makes misrepresentation for his own benefit—In action for deceit, fraud must be actual fraud—Effect of fraud or misrepresentation on agreements—Innocent principal liable to third persons—Liability of firm for fraud of one of its members—Liability of principal for criminal acts

Liability for agent's fraud and misrepresentation in deceit.—A principal is liable to third parties for all frauds and misrepresentations committed or made by his agent acting in the course of his employment, and for the benefit of his principal, even though no express command or privity of the principal be proved [1] But if the fraud or misrepresentation be outside the course of the agents employment, the principal will not be liable;[2] unless he subsequently adopts or ratifies the fraud or misrepresentation.[3]

Liability even though the fraud is unauthorized—To make the principal responsible in an action of deceit the fraud or misrepresentation must have been committed in the course of his employment and for his principal's benefit, even though he was ignorant of, and did not authorize the fraud or misrepresentation, for as is said by the House of Lords in *Mackay* v. *Commercial Bank of New Brunswick*,[4] "It is seldom possible to prove that the fraudulent act complained of was not committed by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond "the scope of the agent's authority" in the narrowest sense of which the expression admits. But so narrow a sense would have the effect

[1] *Barwick* v. *English Joint Stock Bank*, L R, 2 Ex., 265, per Willes J. *Fuller* v *Wilson*, 3 Q. B, 58, which was reversed on ground that the misrepresentation was on the part of the third person, 3 Q. B, 1009.

[2] *Chapleo* v. *Brunswick Benefit Building Society*, L. R, 9 Q B D., 696. *Kerr on Frauds*, p. 84 *Ayre's case*, 25 Beav., 513. *Attorney-General* v. *Briggs*, 1 Jur. N. S., 1084, *Grant* v. *Norway*, 10 C. B., 665.

[3] *Rai Kishen Chand* v. *Shoobaran Rai*, 7 All. H. C, 121 *Udell* v *Atherton*, 7 H & N., 172.

[4] L R., 5 P. C., 394, (411). See also per Willes J., in *Barwick* v. *English Joint Stock Bank*, L. R., 2 Ex, 269.

of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much as to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of, or gave a general authority to commit frauds."

Corporations—These principles are likewise applicable to Corporations; thus in *Barwick* v. *English Joint Stock Bank*,[1] an innocent principal (a Corporation Limited) was held responsible for the fraudulent representation of its authorized agent acting within his authority to the same extent as if it were his own fraud. In that case the plaintiff having for some time on a guarantee of the defendants supplied J. D. a customer of theirs with oats on credit for carrying out a Governments contract, refused to continue to do so unless he had a better guarantee. The defendant's manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment of the oats supplied would be paid on receipt of the Government money in priority to any other payment "except to this bank." The customer was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied oats to the extent of £1,217; and the Government money amounting to £2,676 was received by the customer, and paid into the bank; but his cheque for the price of the oats drawn on the bank in favour of the plaintiffs was dishonoured by the defendants who claimed to retain the whole sum paid in part satisfaction of their debt. The plaintiff then brought an action for false representation against the bank, held that there was evidence to go to the jury that the manager knew and intended that the guarantee should be unavailing, and had fraudulently concealed from the plaintiff the fact which would make it so; and also, that the defendants were liable for the fraud of their agent, and that the fraud was properly laid as the fraud of the defendants. Mr. Justice Willes said:—"With respect to the question whether a principal is answerable for the acts of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. The principle is acted on every day in running down cases. It has been applied also to direct trespass to goods ..... In all these cases it may be said, as it is said here that the master had not authorized the act. It is true he has not authorized the particular

[1] L. R, 2 Ex., 259.

act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in." It was therefore held that the Corporation was liable for the misrepresentation of its agent. This decision has been commented on by Bramwell L. J., in *Weir* v. *Bell*,[1] who has said the reasons given for it were not satisfactory, but that he considered it could be supported on other grounds. On the other hand, in the case of the *Western Bank of Scotland* v. *Addie*[2] in which the case of *Barwick* v. *English Joint Stock Bank* was not considered, it has been held that a Corporation may be made responsible for the frauds of its agents to the extent to which the Company have profited from these frauds, but that they cannot be sued as wrong-doers in an action of deceit by imparting to them the misconduct of those they have employed. There the plaintiff had been, it was alleged, induced by the fraudulent representation of the Bank's agents, the directors, to buy from the Company certain shares, and claimed to recover from the Company his shares, and to be reimbursed in damages, but after his purchase and before the action the Company which had been an unincorporated Company, was, with his concurrence, incorporated and registered under the Joint Stock Company's Act 1856. The case was decided just two days after the case of *Barwick* v. *English Joint Stock Bank Company*. Lord Chelmsford said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principles appears to be this; —where a person has been drawn into a contract to purchase shares belonging to a Company by fraudulent misrepresentations of the directors, and the directors in the name of the Company, seek to enforce that contract, or the person who has been deceived institutes a suit against the Company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the Company, and the purchaser cannot be held to his contract, because a Company cannot retain any benefit which they have obtained through the fraud of their agents But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the Company, but only against the directors." Lord Cranworth said:—"He was a party to a proceeding whereby the Company from which the purchase was made was put an end to; it ceased to be an unincorporated, and became an incorporated Company with many statutable incidents connected with it, which did not exist before the incorporation. The new Company, is now in course of being wound up; he comes too late; the

[1] L. R., 3 Ex., 239.

[2] L. R., 1 Sch App., 146. See also on this point *New Brunswick and Ry. Co.* v. *Conybeare*, 9 H. L. Cas., 725.

appellants are not the persons who were guilty of the fraud, and although the incorporated Company is by the express provisions of the Statute, under which it was incorporated, made liable for the debts and liabilities incurred before the incorporation, I cannot read the Statute as transferring to the incorporated Company a liability to be sued for frauds or other acts committed by the directors before incorporation ..... An incorporated Company cannot in its corporate character be called upon to answer for an action for deceit. But if by the fraud of its agents, third persons have been defrauded, the Corporation may be responsible to the extent to which its funds have profited by those frauds. If it is supposed that in what I said in *Ranger* v. *Great Western Railway Company*,[1] decided in this House, I meant to give it as my opinion that the Company could in that case have been made to answer as for tort in an action of deceit, I can only say I had no such meaning ..... An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the Companies have profited from these frauds, but they cannot be sued as wrong-doers, by imparting to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." This opinion of their Lordships appears to be at variance to that of Willes J., in *Barwick* v. *English Joint Stock Bank*,[2] which has been approved by the Privy Council in *Mackay* v. *The Commercial Bank of New Brunswick*,[3] by Lord Selbourne in *Houldsworth* v. *The City of Glascow Bank*,[4] and by Bowen L. J., in the *British Mutual Banking Company* v. *Charnwood Forest Railway Company*,[5] which cases all appear to decide that where the principal, although a Corporation, has benefited by the fraud of its agents, the principal may be held liable in an action of deceit; and inasmuch as their Lordships were unaware of the decision of *Barwick* v. *English Joint Stock Bank*, at the time when the *Western Bank of Scotland* v. *Addie* was decided, it cannot at all events be said to have been intentionally antagonistic to it. And in *Houldsworth* v. *City of Glascow Bank*[6] (which is an authority for the proposition that an action of deceit against a Company by a shareholder in it is not maintainable) Lord Selborne has adverted to the *dictum* of Lord Cranworth in the *Western Bank of Scotland* v. *Addie*,[7] and whilst admitting the substantial accuracy of Lord Cranworth's statement of the law as there laid down, considered that his *dictum* on the point of pleading might be technically

[1] 5 H. L. Cas., 72.
[2] L. R., 2 Ex., 259.
[3] L. R., 5 P. C., 394
[4] L. R., 5 App. Cas., 317.
[5] L. R., 18 Q. B. D., 714.
[6] L. R., 5 App. Cas., 317, (327).
[7] L. R., 1 H. L. Sc., 145.

inaccurate. The effect of *Houldsworth* v. *City of Glascow Bank*, and of *Western Bank of Scotland* v. *Addie* is as is said in Benjamin on Sale, p. 458, (9th ed.) that the only remedy of a shareholder in a Joint Stock Company, who has been induced to purchase shares by the fraud of the agent of the Company, is rescission of the contract and *restitutio in integrum* and if he is debarred from seeking that relief by the declared insolvency of the Company, or from any other cause there is no remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud.

Principal not liable when the agent makes misrepresentation for his own benefit—That the fraud or misrepresentation must be for the benefit of the principal, is clear from the case of the *British Mutual Banking Company* v. *The Charnwood Forest Railway Company*,[1] which was also an action for deceit. There a customer of the Bank having applied for a loan upon the security of certain transfers of the debenture stock of the defendant Company, the manager made enquiries of a former Secretary of the Company, and was informed by the latter that the Company had sufficient stock to meet the transfers. The advance was accordingly made, but the transfers were in fact fictitious documents which had been issued by the former Secretary without the knowledge or consent of the defendants, in collusion with the alleged transferer, who afterwards absconded. The plaintiff bank had previous dealings with the former Secretary, but were unaware that he had ceased to be Secretary to the defendants. The suit was brought to render the defendants liable for the over issue of their stock. The jury found that the enquiries were made from the former Secretary as Secretary to the defendants, and that the defendants had held him out as their Secretary to answer enquiries. Lord Coleridge left the plaintiff to move to enter judgment; for the defendant it was argued that they were not liable because the former Secretary had committed the fraud for his own private benefit, and that a Corporation deriving no benefit from the fraud of its agent is not responsible for it, whilst for the plaintiffs it was contended that the defendants were bound by their agent's statements, and were liable for his fraud. Manisty and Mathew JJ., held that there was no difference between a Corporation and an ordinary principal, and that the defendants were liable even if they had derived no benefit from their agent's fraud; but on appeal the Court held that a principal could not be held liable in an action of deceit for the unauthorized and fraudulent act of his servant committed not for the general or special benefit of the principal, but for the servant's or agent's private ends. The Master of the Rolls further added, that he considered there would be great danger in departing from the definition of liability laid down by Willes J. in *Barwick* v. *English Joint Stock Bank*,[2] and in extending the

[1] L. R., 18 Q. B. D., 714.

[2] L. R., 2 Ex., 257.

responsibility of a principal for the frauds committed by a servant or agent beyond the boundaries hitherto recognized by English law. This decision equally applies to Corporations as to unincorporated Companys or Societies, as well as other principals.[1]

In action for deceit the fraud must be actual fraud.—It has been held in a late case of *Derry* v. *Peek*,[2] in which all the old authorities were reviewed (which case will be found more fully set out in previous pages that in an action of deceit, actual fraud must be proved; and that a false statement made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. And that such a statement if made in the honest belief that it is true is not fraudulent, and does not render the person making it liable to an action of deceit. It is important that it should be borne in mind that an action for deceit differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however, honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone;[3] the additional elements necessary were held by their Lordships to be, that it must be shewn that the false representation has been made knowingly or without belief in its truth, or recklessly, without caring whether it be true or false. This decision therefore reinstates the general rule laid down for actions in deceit by Bramwell J., in *Dickson* v. *Reuter's Telegraph Company*.[4] The distinction between the two classes of actions is also pointed out by Baron Martin in *Udell* v. *Atherton*,[5] *viz.*, that in an action upon the contract the representation of the agent is the representation of the principal, but in an action for deceit the misrepresentation must be proved against the principal. Beside this liability to an action of deceit, which is an action in pure tort and is founded on fraud; the agent's fraud or misrepresentation will render his principal liable to other forms of action.

Effect of fraud or or misrepresentation on agreements.—Misrepresentation and fraud made or committed by agents acting in the course of their business for their principals have the same effect on agreements made by such

[1] *Japanese Curtain and Patent Fabric Company, in re Scholbred*, 28 W. R, (Eng.), 339.

[2] L. R., 14 App. Cas., 337.

[3] *Derry* v. *Peek*, per Lord Herschell, L. R., 14 App Cas., 359

[4] L. R., 3 C P. D., 1 C. A., 5. See also *Childers* v. *Wooler*, 2 El. & El., 287, and *Wilde* v. *Gibson*, 1 H. L. Cas., 633, per Lord Campbell.

[5] 7 H. & N., 172; 30 L. J. Ex., 337.

agents, as if they had been made or committed by the principals; but misrepresentation and frauds made or committed by agents, in matters which do not fall within their authority do not effect their principals.[1] And this effect is to render voidable the agreement. Both "fraud" and "misrepresentation" have for the purposes of the Contract Act, been defined by sections 17, 18, 19 and 21 of that Act. The fraud and misrepresentations referred to in s. 238 must therefore be subject to those definition. If, therefore, the fraud or misrepresentation by the agent was committed or made by him in the course of his business for his principal, the principal will be liable.[2] It is immaterial whether the principal himself is innocent of the fraud or misrepresentation.[3] The third person may sue the principal in either of the following modes:[4]—

1. He may avoid the agreement and sue for damages; or to have the contract rescinded.[5]

2. He may sue for specific performance, claiming also performance of the matter as to which misrepresentation has been made or damages in respect thereof.[6] In the first mentioned case he elects to rescind the contract, and must therefore, restore any benefit he may have received under it, so far as he can.[7]

Innocent principal liable to third persons.—The "misrepresentation" under s. 18 of the Contract Act may be without "intent to deceive," and be "caused innocently;" and therefore as under s. 238 the agent's fraud and misrepresentation is the principal's fraud and misrepresentation, it appears to be immaterial whether the principal is innocent or not of the agent's fraud or misrepresentation. This follows the English case law which lays down that a principal will be liable though innocent of any complicity in the fraud. Although at one time it was held that the principal when ignorant that the representation was made by his agent was not affected thereby, even though the true facts were known to him.[8] But as to this Lord Abinger (one of the Judges who heard the case) differred in opinion from the rest of the Court, holding that it did not follow because the plaintiff was not bound by the representation of his agent, even if made without his authority, that he was

[1] Ind. Contr. Act, s. 238.

[2] See *Nursey Spinning and Weaving Co., in re*, I. L. R., 5 Bom., 927. As to the differences between the rules of Common Law and Equity as to when a contract could be rescinded, reference may be made to *Redgrave* v. *Hurd*, L. R., 20 Ch. D., 13.

[3] *Rawlins* v. *Wickham*, 1 Giff., 355. *Smith's case*, L. R., 2 Ch., 604. Cunningham on Contract, p. 96. *Sadhoojunnissa* v *Ramhurry Mundul*, 1 Hay, 461. *Doorga Narain Sen* v. *Baney Madhub Mozoomdar*, I. L. R., 7 Calc., 199.

[4] See Cunningham on Contracts, p. 94.

[5] Act I of 1877, s. 35.

[6] Act I of 1877, ss. 19, 27. Ind. Contr. Act, s. 19, para. 2.

[7] Ind. Contr. Act, s. 64.

[8] *Cornfoot* v. *Fowke*, 6 M. & W., 358.

therefore entitled to bind another man to a contract obtained by the false representation of his agent; that it was one thing to say that he might avoid the contract if his agent without his authority had inserted a warranty in the contract, and another to say that he might enforce the contract obtained by means of a false representation made by his agent because the agent had no authority. The view taken by Lord Abinger was followed by Lord Denman C. J., in *Fuller* v. *Wilson*,[1] where his Lordship said:"—We think the principal and his agent are for this purpose completely identified, and that the question is not, what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them; and in *Moens* v. *Heyworth*,[2] Lord Abinger again adhered to this view, the majority of the Court, however, holding that no action for deceit would lie against the principal without proof of moral fraud. In the numerous cases on this subject there is a conflict of opinion on this point between the Court of Queen's Bench and the Court of Exchequer: this conflict Mr. Benjamin points out as being[3] that the Queen's Bench consider the sole test to be whether the purchaser was deceived by an untrue statement into making the bargain; whilst the Court of Exchequer consider it further necessary that the party making the untrue statement should know it to be untrue. The decision in *Cornfoot* v. *Fowke*[4] has, however, been questioned on the point that the principal will not be liable for the consequences of false representations made by his agent with full belief in their truth, when the principal himself has a knowledge of the real facts, in several cases, *viz.*, by Lord Cranworth in the *National Exchange Company of Glascow* v. *Drew*,[5] and in *Bartlett* v. *Salmon*,[6] and by Willes J., in *Barwick* v. *English Joint Stock Bank Company*;[7] In *Wheelton* v. *Hardisty*;[8] and treated of in *Mackay* v. *Commercial Bank of New Brunswick*,[9] in *Weir* v. *Bell*[10] and in *Houldsworth* v. *City of Glascow Bank*;[11] it can therefore not be treated as correct law. In the *National Exchange Company of Glascow* v. *Drew*, Lord St. Leonards says of it, "I should feel no hesitation, if I had myself to decide that case, in saying, that although the representation was not fraudulent—the agent not knowing that it was false—and false to the knowledge of the principal, it ought to vitiate the contract." The decision was also dissented from, if, as the Court put it, it was contrary to the view taken, in *Ludgater* v. *Love*,[12] in which it was held that where a principal purposely employs an agent ignorant of the truth, in order that such agent may innocently make a false statement, believing it to be true, and may so deceive the party with whom he

[1] 3 Q B, 58.
[2] 10 M. & W., 147.
[3] Benj on Sale, 438 (3rd Ed., 419).
[4] 6 M. & W., 358.
[5] 2 Macq H L, 103
[6] 6 De G M & G, 39
[7] L. R., 2 Ex., 262.
[8] 8 El. & Bl, 270.
[9] L. R, 5 P. C., 394
[10] L R., 3 Ex D, 244
[11] L R., 5 App. Cas., 326.
[12] 34 L. T., 694

is dealing, the representation by the agent becomes a misrepresentation of the principal, so as to vitiate the contract.

Liability of a firm for fraud of one of its members—A firm is liable for a fraudulent misappropriation of funds committed by one of the partners in the course of the firm's business and within the scope of his usual authority, even though no benefit be derived therefrom by the other partners; but not for transactions undertaken outside the course of the partnership business. Thus where trustees deposited with a solicitor certain bonds payable to bearer; his partner having no knowledge of this, but letters referring to the bonds were charged for in the bills of costs delivered by the firm; letters referring to the bonds were also copied into the letter book of the firm; and cheques for money received as interest on the bonds were drawn on account of the firm The solicitor made away with the bonds and the trustees sued his partner who was held to be liable:—Duncan J., said, (in considering whether it was *primâ facie* the business of a solicitor to take care of securities or money for a client,) "It cannot be treated as a matter of absolute certainty that in any case in which securities have been trusted to one partner, this may not possibly be, under the circumstances "firm business," because although it is not *primâ facie* the duty of a solicitor to act as a money scrivener and to receive money, or to act as a wharehouseman, or as a banker, there is no rule of law laying it down that a solicitior may not do such a business, and there is nothing to make it criminal or wrong or negligent in a solicitor so to do under particular circumstances. If, therefore, it turns out that the solicitor had so acted as to make it "firm business" by reason of the mode in which he has dealt with it in the books of the firm, and the other partners in the firm have such notice of it as reasonable and prudent people would get from a proper examination of their own books, there is nothing which decides that in such a case it may not be "firm business." It would be a question of fact in each case, and even though a partner might say, 'I do not know anything about this transaction;' yet looking at his dealings with his partner, and at the dealings of the partner with the persons who trusted him, it may after all be "firm business." That seems to be the result of the cases, ... We have to look at the transaction from the beginning to the end in order to see whether the property in question has been so dealt with as to make it "firm business" as against every member of the firm." His Lordship also said that he considered the case to fall within that of *Dundonald* v. *Masterman*,[1] as to that case his Lordship said:—"The case of *Dundonald* v. *Masterman* seems to me to come to this, that if the business was business which devolved upon the firm the necessity, and in which the firm had undertaken the duty, of dealing with the property and of assisting the parties to

[1] L. R., 7 Eq., 504

manage the property, then if in the management of that property securities get into the possession of any member of the firm who had undertaken that duty, and he fraudulently misappropriates the property, he makes his partners responsible."[1] So an ordinary mercantile firm is responsible for frauds committed by one of its members, or by a gomasta or other similar agent, while acting for and in the business of the firm, and innocent partners cannot divest themselves of liability on the ground that they never authorized the commission of the fraud.[2] So where three persons executed in favour of a firm of bankers consisting of three members a power of attorney empowering them jointly and severally to receive the dividends and to sell out certain stock. This power was sent by the bankers to their broker who deposited it with the Bank of England. One of the partners in the banking firm alone clandestinely sold out the stock, but the firm had credit for the proceeds The sale was concealed, and the amount of dividends for some time accounted for. Held, that the sole surviving member of the firm was liable for the sale, though it had taken place after the death of his two partners, and that he would have been equally liable, though the proceeds had not been placed to the credit of the firm.[3] Where, however, one of several partners has committed a wrong against a third person but not for the benefit of the firm, the firm has been held not to be liable.[4] So a representation made by one partner relating to a matter within the limits of the partnership business, and amounting to a guarantee by the firm to the parties concerned, that they would be placed in the same situation as if the fact represented were true, is binding on the firm.[5]

Liability for criminal acts.—To make a principal criminally responsible for an offence committed by his agents, it must be shown that there has been some act or illegal omission on the part of the principal, whereby he abetted the offence or some prior instigation or conspiracy. Thus where a master was in his carriage being driven by his servant, and the latter drove recklessly on a public way, the Court held the master had illegally omitted to give his servant proper directions restraining him within the limits of the law, and convicted him under s. 279 of the Penal Code.[6] But as a general rule he will not be held

[1] *Cleather* v *Twiden*, L. R., 24 Ch. D., 731. See also *St. Aubin* v. *Smart*, L. R., 3 App. Cas., 646. *Harman* v. *Johnson*, 2 El. & Bl., 61. *Bishop* v. *Countess of Jersey*, 2 Drew., 143.

[2] *Luckhee Kant Bonik* v. *Ram Chunder Bysack*, 2 W. R., 186.

[3] *Sadler* v. *Lee*, 6 Beav., 324.

[4] *Ex-parte Eyre*, 1 Ph., 227.

[5] *Blair* v. *Brownley*, 2 Ph., 354.

[6] *Crown Prosecutor* v. *Shamsunder*, 1 N. W. P. H. C., 310. See also the class of *quasi* criminal cases arising under Excise Acts, *in re Baney Madhub Shaw*, 1. L. R., 8 Calc., 207, *cf. Empress* v. *Nuddiar Chund Shaw*, I. L. R., 6 Calc., 832.

responsible criminally for an act of his agent or servant committed without his knowledge or consent; and indeed, though this may probably be considered to be too wide a proposition, it has been held that he is not criminally responsible for the wrongful act of the servant, unless he can be shewn to have expressly authorized such act [1]

[1] *Suffer Ally Khan* v. *Golam Hyder Khan*, 6 W. R Cr, 60

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